Status: GRANTED

v.
United States

Docketed: July 17, 1995

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: LeBell,Robert G., Gleason,Brian W.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 17 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 17 1995		Order extending time to file response to petition until September 20, 1995.
5	Sep 20 1995		Brief of respondent United States in opposition filed.
6	Oct 5 1995		DISTRIBUTED. October 27, 1995 (Page 3)
7	Oct 18 1995	X	Reply brief of petitioners filed.
9	Oct 30 1995		REDISTRIBUTED. November 3, 1995 (Page 12)
11	Nov 6 1995		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
12	Dec 4 1995		Peter D. Isakoff, Esquire, of Washington, D. C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
13	Dec 4 1995		Joint appendix filed.
14	Dec 11 1995		Record filed.
		*	Original record proceedings U.S. District Court for the Eastern District of Wisconsin (BOX) (2 SEALED ENVELOPES)
15	Dec 19 1995		Brief of petitioners Saul Ornelas, et al. filed.
16	Dec 20 1995		Brief amici curiae of American Civil Liberties Union, et al. filed.
18	Jan 5 1996		Order extending time to file brief of respondent on the merits until February 15, 1996.
20	Jan 12 1996		Brief amici curiae of Americans for Effective Law Enforcement, et al. filed.
19	Jan 18 1996		Order extending the time to file brief of the United States on the merits until January 22, 1996.
21	Jan 22 1996		Brief of respondent United States filed.
23	Jan 23 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
22	Jan 24 1996		SET FOR ARGUMENT TUESDAY, MARCH 26, 1996. (2ND CASE).
24	Jan 29 1996		CIRCULATED.
25	Feb 2 1996	G	Motion of the Solicitor General for divided argument filed.
26	Feb 20 1996		Motion of the Solicitor General for divided argument GRANTED.
27	Feb 22 1996	X	Brief amicus curiae of Peter D. Isakoff in Support of Judgment Below filed.
28	Mar 16 1996	X	Reply brief of petitioners Saul Ornelas, et al. filed.
29	Mar 26 1996		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

95-5257

No.95_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA, AND SAUL ORNELAS,
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Brian W. Gleason, Esq.
230 W. Wells Street
Suite 702
Milwaukee, Wisconsin 53203
(414) 277-5076

Counsel of Record for
Petitioner Ismael Ornelas-
Ledesma

Robert G. LeBell, Esq.
Styler, Kostich, LeBell,
Dobroski & McGuire
100 East Wisconsin
Suite 1700
Milwaukee, Wisconsin 53202-4114
(414) 276-1233

Counsel of record for Petitioner
Saul Ornelas

Supreme Court, U.S.
FILED
JUL 17 1995
OFFICE OF THE CLERK

PARTIES TO THE ACTION BELOW

The parties in the United States Court of Appeals for the Seventh Circuit include petitioners Ismael Ornelas-Ledesma and Saul Ornelas and the United States of America. The causes below in the second appeal are listed as 94-3349 and 94-3350. Both cases were joined for appeal by order of the Seventh Circuit. In the first appeal, both petitioners' cases were numbered as 92-CR-243.

OPINIONS BELOW

This petition seeks review of a published opinion by the United States Court of Appeals for the Seventh Circuit, United States of America v. Ismael Ornelas-Ledesma and Saul Ornelas, 16 F.3d 714 (7th Cir. 1994), decided February 10, 1994, and United States of America v. Saul Ornelas, Ismael Ornelas Ledesma, an unpublished decision and order dated April 18, 1995.

The first magistrate-judge's recommended order is dated February 12, 1993. The original decision of the district court denying the motions to suppress is dated March 9, 1993. The published opinion of the court of appeals is dated February 10, 1994. In the first appeal, the circuit court of appeals vacated the judgments of conviction and remanded the case to the United States District Court for the Eastern District of Wisconsin for further findings.

Upon remand, the magistrate-judge recommended suppression of the seized drugs. The magistrate-judge's post remand

recommended order is dated March 29, 1994. The district court's decision after remand is dated September 20, 1994.

The district court disagreed and reinstated the convictions. A timely appeal followed and the circuit court of appeals affirmed the convictions in an unpublished decision and order dated April 18, 1995. This appeal follows. All decisions are appended.

JURISDICTION

The statutory provision conferring jurisdiction of this Court to review the judgment below by writ of certiorari in a federal criminal case is 28 U.S.C. §1254. The court of appeals has appellate jurisdiction based on 28 U.S.C. §1291. The jurisdiction of the district court is based on 18 U.S.C. §3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE UNITED STATED CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Milwaukee County Sheriff's detective, Michael Pautz, was conducting drug interdiction activities at 8:30 a.m. in the morning of December 11, 1992 (R.49:29). He observed a 1981 Oldsmobile bearing California plates parked in front of Room 4 of the Suburban Motel, 4600 S. 27th St., Milwaukee, Wisconsin. Upon checking the motel registry, (R. 49:26) he learned that Ismael Ornelas, from **California**, was registered in Room 4 (R.49:31).

Pautz radioed his dispatcher and requested him to "run" the California plates to determine the car's owner (R.49:28). The dispatcher reported that the car was registered to "Miguel Ornelas" with either a middle or second last name of "Ledesma." He was unsure if the "Ledesma" was before or after the "Ornelas." (R.49:29). The address for the owner was 830 N. 16th Street, San Jose, California (R.49:5).

Approximately 20 minutes later Det. Don Hurrle met Pautz across the street from the motel (R.49:33). A Drug Enforcement Administration Narcotics and Dangerous Information

Systems check (hereinafter referred to as NADDIS) was then made for the names "Miguel Ledesma Ornelas" from San Jose, California and "Ismael Ornelas". (R.49:33).

The NADDIS computer check showed a "hit," (an indication of some prior contact) for "Miguel Ledesma Ornelas" AKA Lemus-Ledesma, Miguel, with a DOB of 09/29/45, 150 lbs., Hispanic male from El Centro, California as being a heroin dealer (R.49:39). The NADDIS check also showed that an Ismael Ornelas, Jr., from **Tucson, Arizona** was a 1000-kilo a month cocaine dealer (R.49:35-36). A wanted check was made on both names and neither were wanted.

The computer information given to Pautz regarding the owner of the car did not include a date of birth (R.49:35-36). Pautz did not ask for a check on the car's registered owner to determine if the two persons listed in the DMV (California Department of Motor Vehicles) and NADDIS checks were one and the same, nor did he attempt to determine the age of the DEA information or to further obtain identifying information such as height and weight (R.49:56,60,61).

Pautz's suspicions were raised because the car was from a "drug source" state, the persons were of Hispanic descent, no advance reservations were made for the motel, and because the NADDIS check showed that a person bearing the name Ismael Ornelas was a drug dealer (R.49:54). Pautz and Hurrle called for and obtained a "drug sniffer" dog (R.49:37).

After moving across the street to a lot next to the

motel, the officers observed two people exit the motel. One individual loaded the trunk with luggage (R.50:331). One of the individuals entered the car on the passenger side and the other went into the motel office (R.50:371). The second individual returned to the car and entered on the driver's side (R.50:305). At that point, the officers moved their own vehicles to both sides of the suspect vehicle (R.50:306).

Hurrle asked if there were any drugs in the car. Both purportedly, (almost simultaneously) stated, "No". (R.50:307). It is claimed that both gave Hurrle permission to look through the car (R.50:307). Before conducting the search of the vehicle, the appellants were asked to produce identification. Ismael Ornelas Ledesma produced a **California** identification showing his residence as Martinez, California (R.50:306-307).

Det. Luedke arrived at the scene with his drug dog. He checked the interior of the car without use of the dog and felt a "somewhat loose" area near the arm rest of the rear passenger side. He suspected the possibility of drugs behind the panel. Luedke testified that he then went to the vertical area of the car body where the passenger door closes, (the door jam), and observed a plastic vent cover, held in place with one "rusted" Phillips screw (R.50:214-221).

Luedke believed that the presence of rust on the screw was evidence that it had been recently removed. (The other screws appeared rust-free).

Luedke removed the Phillips screw and the vent cover and

discovered a paper bag containing suspected cocaine (R.49:156-157). Unable to remove the bag through the vent, he popped open the "somewhat loose" panel, toward the interior of the car, and removed the drugs through this opening.

After the arrest, custodial statements were made in which Ismael Ornelas-Ledesma made inculpatory statements.

The petitioners were charged in a one-count indictment with possession with intent to distribute approximately 2,000 grams of cocaine in violation of §21 U.S.C. §841 (a)(1) and §18 U.S.C. §2. (R.4.)

Three days of evidentiary hearings were held, wherein the petitioners challenged the stop, the search and the statements. The magistrate judge entered an order denying the appellants' pre-trial motions to suppress. The order of the magistrate judge entered on the 12th day of February, 1993, (R. 34) was affirmed on different grounds by the trial court in an order entered on the 9th day of March, 1993, (R. 40). Additionally, the magistrate judge denied the appellants' motion to compel discovery in an order dated January 15, 1993, (R. 23).

The petitioners pled guilty to count one of the indictment. This was a conditional plea pursuant to Rule 11 (a)(2) F.R.Crim.P. (R. 41).

On March 11, 1993, the petitioners filed a motion for reconsideration before the trial court, requesting a review of its decision and order of 3/9/93, (R.42) referred to above,

and to further consider an inspection of the suspect vehicle. The trial court orally denied the motion on March 11, 1993, (R. 52).

A judgment of conviction was entered on March 11, 1993 (R. 41). Saul Ornelas was sentenced on the 28th day of May, 1993, to 63 months for count one, (R.45). A notice of appeal was filed on the 7th day of June, 1993, (R.47). Ismael Ornelas-Ledesma was sentenced to 60 months, on May 20, 1993, (R. 38) and filed a notice of appeal on May 27, 1993. (Ismael Ornelas's Docket, R. 41).

In the petitioners' first appeal, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the district court in a decision and order dated February 10, 1994. The order remanded the matter to the trial court for further proceedings to determine whether the inside panel secreting the drugs was indeed loose.

The court of appeals reversed because the district court ignored disputed testimony regarding the credibility of the arresting officer.

The district court had not personally heard the challenged testimony, had not personally inspected the car, as requested by petitioners, and did not order the officer, whose credibility was challenged, to appear before him to testify as to the challenged matters.

The magistrate judge disbelieved a closely related portion of the testimony of the arresting officer concerning

whether the vent cover in the doorjamb of the car was held in place with a "rusty" screw.

After the evidentiary hearing concerning the "rusty" screw, petitioners requested that the screw be produced for examination. The screw was produced by the officer and examined by the magistrate judge and later by the court of appeals. The court of appeals, echoing the magistrate judge, stated, "The screw is in the appellate record and we have looked at it ourselves. There is not the slightest trace of rust or of anything that looks like rust." 16 F.3rd at 719.

Nonetheless, the magistrate judge upheld the search on the basis of inevitable discovery. The district court, while not relying on the inevitable discovery theory, upheld the search on the basis of the confluence of three factors;

The first was the closely related testimony by this same officer concerning the "somewhat loose" panel. The second was the fact that the car in question fit a "drug courier profile." It was an older two-door GM car registered in California, driven by two people who checked into a motel. The individual did not make reservations. The third was the comparison of the name of the person registered in the motel and the registered owner of the car. The last name supposedly (erroneously), was the same as names found in the government's NADDIS (Narcotics And Dangerous Drugs System) computer.

The court of appeals rejected the inevitable discovery theory because the government failed to defend it on appeal.

It stated that the drug courier profile "seems only a little better than a dragnet for Hispanics," and it noted that the secondary literature "depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated." Ornelas, 16 F.3d at 717.

It likened the NADDIS information to that of an informant not known to be reliable. Ornelas, 16 F.3d at 718. The court acknowledged that the dispatcher reversed the two last names but thought that that was just the sort of error one might expect. It was impressed, however, by the fact that there were not one but two hits, notwithstanding the one hit showed an Ismael Ornelas from Arizona and the petitioner was from California.

It also noted that the other name was from El Centro, California, a location, hundreds of miles from the address of the registered owner of the car. (The record shows it to be six hundred miles). The court remanded for a determination concerning whether the panel was indeed loose as testified to by the officer.

That determination was to be made by one of three ways; the district court judge himself hearing the testimony of the officer, an inspection of the automobile, or the magistrate judge making a finding of credibility as to that portion of the testimony concerning the "loose panel."

Upon remand, the matter was referred back to the magistrate judge. He found that "NADDIS reports are so

convoluted and mismatched that they are of little probative value in the probable cause determination." (A-103). He similarly was unimpressed by the "questionable drug courier profile," (A-103). He made the finding "except for the rule of Falsus In Uno Falsus In Omnibus, I have no reason not to believe the panel was loose. However, the loose panel alone, given the age of the Oldsmobile is not probative evidence of the fact it necessarily had been recently removed." (A-102). It was a 1981 car.

His recommended order of March 29, 1994 granted petitioners' motions to suppress the cocaine. On September 20, 1994, the district court issued an order not adopting the recommended suppression by the magistrate judge.

The case was again appealed. The same panel, Chief Judge Richard Posner writing for the court, this time affirmed the decision of the district court denying petitioners' motions to suppress.

The brief opinion, (App:147-48), less than two pages, states,

> Our review is deferential. The district judge's finding of probable cause may be set aside only if clearly erroneous. We no not find clear error. The district judge's opinion, although brief, adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search. The judgment of the district court must therefore be, and it is affirmed.

ARGUMENT I. IN NON-WARRANT CASES, AN APPELLATE COURT SHOULD CONDUCT A DE NOVO REVIEW CONCERNING REASONABLE SUSPICION TO STOP AND PROBABLE CAUSE TO SEARCH.

Certiorari should be granted to end the conflict among the circuits regarding the appropriate appellate standard of review of the ultimate legal conclusion in non-warrant cases. Most circuits continue to adhere to a de novo standard of review for conclusions of law and the clearly erroneous standard for findings of fact. Since 1992 the Seventh Circuit has applied a clearly erroneous standard for both findings of fact and conclusions of law in non-warrant cases.

Petitioners had argued in each appeal to the Seventh Circuit that a de novo standard of review for the ultimate legal determination is required.

In the first appeal, the court of appeals reversed because it had serious concerns about the propriety of the district court making credibility determinations in the absence of specific findings by the magistrate judge. The magistrate judge found the related testimony concerning the "rusty screw" incredible, because of the condition and appearance of the screw later produced in court. He had not made a specific finding of fact about the credibility of the testimony regarding the "somewhat loose" panel.

The district court, having only read the testimony of one officer, made the finding, "This reasonable suspicion became probable cause when Officer Luedke found that the right door

panel of the car was loose, leading him to suspect that the panel had been recently removed and that contraband was hidden inside. (Id. at 6-7; Transcript of Off. Luedke's Testimony at 15-16." (App.117).

One of petitioners' counsel had personally inspected the panel but found that it was not unlike the other panels and requested the district court, together with all counsel, to conduct a personal inspection of the panel. The district court rejected this suggestion, later made by the court of appeals in its remand order (48:4-5):

> The magistrate judge initially concluded, "the records disclosed no evidence from which Luedke could conclude that a hidden panel contained contraband (App.136)." The Court finds that it can and did rely upon what Officer Luedke stated. The fact that there had been a request in this motion for reconsideration for an inspection of the automobile by the Court and counsels--Mr. LeBell having done so and found that his inspection disclosed that there wasn't the loose panel, or that none of the panels--or that the particular panel, the specific panel, that was testified to by Officer Luedke as being loose was not loose and not apparently somewhat loose upon being physically felt. That examination the Court finds is not necessary because regardless of what the Court would find at the --any subsequent inspection, the fact of the matter is that the records reviewed by the Court and the testimony of Officer Luedke is one which discloses that in his estimation and his opinion and by his calculation and his view and his belief when--as he testified he felt the panel or observed the panel and engaged the panel, that it appeared, quote, to be--or didn't appear but physically felt like it was somewhat loose, close quote.

The court of appeals vacated and reversed because "we do not know whether Luedke's testimony about the door panel should be believed." (App-156). The remand was for the

purpose of making the factual determination of whether it was in fact loose, and then the legal determination whether a loose panel, the NADDIS information, and the drug courier profile add up to probable cause to believe there were drugs secreted in the car's body, such as to allow the officers to dismantle the car. (App-157).

The court of appeals had serious concerns about the propriety of a district court rejecting the credibility determinations of a magistrate judge under 28 U.S.C. 636 (b)(1) and substituting its own dispositive findings. "[T]o do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach." N.7. See United States v. Raddatz, 447 U.S. 667 (1980).

Upon remand, the trial court was directed to inspect the car, have the officer testify again before the district court, or refer the matter to the magistrate judge for his credibility determination of Officer Luedke's testimony concerning the "somewhat loose panel." (App.156-57).

The district court choose the last option. The magistrate judge made the credibility determination in favor of the officer. It was less than a sterling endorsement. The magistrate judge did not articulate why he found the officer credible.

The totality of the magistrate judge's credibility determination is as follows:

> Officer Luedke's testimony as to the screw was found by this Court to be incredible, in light of the undisputable condition of the screw itself. Nonetheless, except for the rule of Falsus In Uno Falsus In Omnibus, I have no reason not to believe the panel was loose. Thus, I accept as credible Luedke's testimony that the panel was loose. (App.102).

The magistrate judge then went through a detailed analysis of seven other decisions concerning door panels and cavities used to secret drugs. He made a determination that probable cause was lacking to reasonably suspect the presence of drugs in the body cavity.

Not deterred, the trial court merely referred to the cases cited by the magistrate. The trial judge did not examine the cases. Instead, he came to a contrary legal conclusion concerning the existence of probable cause. "The Court acknowledges that the issue is a close one, but weighing the evidence "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement," See Texas v. Brown, 460 U.S. 730, 742 (1983), the Court is compelled to reach the same conclusion." (App.97) (The same conclusion it had reached a year earlier).

In the first appeal, the court of appeals rejected petitioners' argument that a de novo standard of appellate review was the appropriate standard of review (App.154):

> Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; the proposition that review of a district court's determination of reasonable suspicion (if it is a Terry stop) or probable cause (if it is an arrest, search, of seizure) is

> plenary, embraced in such cases as United States v. Jaramillo, 891 F.2d 620,626 (7th Cir.1989), is no longer tenable after United States v. Spears, 965 F.2d 262 (7th Cir. 1992), where, overruling inconsistent precedents, this court held that the standard for judicial review of determinations of probable cause was clear error. There is no basis for distinguishing in this regard between probable cause and reasonable suspicion. They are adjacent points on a continuum.

In the post remand appeal, petitioners once again argued that they were entitled to a de novo standard of review concerning the ultimate legal determinations of the district court. That argument will be reproduced here.

Two years ago year, this circuit formulated a uniform standard of review of "clear error" for Fourth Amendment probable cause cases, to put an end to the "complete confusion" which then existed in this circuit by virtue of the varying standards announced by different panels. United States v. Spears, 965 F.2d 262 (7th Cir. 1992). Four active judges voted to rehear the case, but a majority voted not to rehear the case pursuant to Circuit Rule 40 (f).

Spears announced that the new rule would apply to both warrant and non-warrant cases. Id. at 269. As a starting point, the Spears court looked at Illinois v. Gates, 462 U.S. 213 (1983) and Massachusetts v. Upton, 466 U.S. 727 (1984)(per curium) for its rationale. Upton, at 733, stated, "A deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." The test would be if the evidence produced "a substantial basis" for the issuance of the

warrant. Id. at 733.

Spears, however, refused to acknowledge a standard between clearly erroneous and de novo, stating that in warrant cases, review would be for clear error. Id. at 270. Having said that, it went on to state:

> Because there is little to distinguish a magistrate's probable cause determination in a warrant case and a district court's probable cause determination in a non-warrant case, appellate review should be the same for both. In warrant cases, the magistrate is the front-line judicial officer making the initial determination. In non-warrant cases, it is the district judge who makes the initial determination, who asks the same question the magistrate asks in a warrant case: is there probable cause...It is the frontline officer in both cases who conducts the initial inquiry, who concludes there is or there is not probable cause, and an appellate panel should not substitute its judgment in either case. Id. at 270.

Thus, the genesis of the rule stemmed, in part, from the Supreme Court who wanted to encourage police to get warrants by making it more difficult to reverse the magistrate who issued the warrant. Gates at 237.

The standard of review, however, which a reviewing court was to accord a magistrate in a warrant case, was whether the magistrate had a "substantial basis for..concluding that a search would uncover evidence of wrongdoing." Id. at 236. There is no justification for the more deferential "clearly erroneous" standard, given the Supreme Court's clearly articulated standard of review.

The rationale asserted in Spears is that under Illinois v. Gates, 462 U.S. 213 (1983), reviewing courts are to give deferential review of the findings of fact made by the frontline magistrate who heard the affiant.

The Spears court rationale that there is little difference between a warrant and non warrant case is erroneous for two reasons. In a non-warrant case the rationale expressed in Gates, to encourage warrants, is not applicable. In non-warrant cases the reviewing court's decision should be subject to plenary review to encourage the use of warrants in the first instance.

In non-warrant cases the district judge who makes the decision is generally **not** the person who heard the testimony of the witnesses. In most criminal cases that person is the magistrate judge, who is delegated the responsibility of conducting the evidentiary hearing and making recommended findings of fact and conclusions of law. As this case demonstrates, the district court frequently makes a determination of probable cause in non-warrant cases without having heard a single witness or reviewed the transcripts of the proceedings.

Under 28 U.S.C. §636(b)(1), the court may "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations. The district court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings

or recommendations to which objection is made." The problem is that the statute does not spell out the means by which to conduct a de novo review. Is it a new evidentiary hearing, a review of the transcripts, or a remand to the magistrate for the purpose of getting specific credibility determinations if that is the subject of the filed objections?

The front-line judge who, is clearly in the best position to make findings of fact, is the magistrate, in the non-warrant case in which an evidentiary hearing is conducted. In this instance, the magistrate judge who heard all of the testimony, recommended suppression of evidence. The district judge ruled against suppression. Here, the district court heard none of the testimony and reviewed the transcript of only one of the officers' testimony. There were five law enforcement officers who gave testimony, but the court did not order transcripts of their testimony.

Even upon remand, the district court's decision makes no reference to the testimony of the other officers, some of whom were called by the defense. As an example, Sgt. Wiggins, a defense witness, testified that he could get the date of birth of the registered owner of the target automobile via his computer. Accessing this information has been done routinely for the last ten to twenty years (R.45:357-361).

Two officers, including one of the arresting officers, stated they did not attempt to get this information for identification purposes because they did not believe they

could access the material (R.45:327)(R.44:59).

Thus, in the typical non-warrant case, the Gates' rationale of encouraging the use of warrants is inapplicable. The rationale in Spears at 271, is that: "It is the front-line judicial officer in both cases who conducts the initial inquiry, who concludes there is or is not probable cause, and an appellate panel should not substitute its judgment in either case." That rationale is similarly non-existent in most non-warrant cases where, as here, the front line officer is the magistrate judge.

The Spears rationale is seriously eroded, as this case demonstrates, where the district court's decision concerning the ultimate legal issue of suppression is at a variance with that of the magistrate judge.

There is good reason for a reviewing appellate court to exercise plenary review. Appellate courts are far more likely to have a keener appreciation for the more subtle aspects of fairly complicated Fourth Amendment jurisprudence by virtue of the fact that legal reviews are their principle function.

The district courts spend a good part of their calendars conducting trials. They are often overworked and understaffed, and have very short and rigid time-frames in which to make decisions. In a case in which objections to recommended findings are filed, the district court often has but a few days to make its decision prior to the scheduled jury trial date.

In its second response to petitioners challenge to the Spears clearly erroneous standard, the Seventh Circuit was again brief.

> The defendants appeal. Our review is deferential. The district judge's finding of probable cause may be set aside only if clearly erroneous. We do not find clear error. The district judge's opinion, although brief, adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search.

(App.147-48).

This Court, in rejecting the de novo standard of review in warrant cases, stated in Illinois v Gates, 462 U.S. 213, 236-37 (1983):

> "A grudging or negative attitude by reviewing court toward warrants," Ventresca, 380 U.S., at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant;...Reflecting this preference for the warrant process, the traditional standard of review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for ... conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. (Cites omitted).

By announcing the more deferential clearly erroneous standard of review in non-warrant cases, the Seventh Circuit seriously erodes the incentives which this Court in Gates hoped to foster.

When the standard of review in warrant and non-warrant cases is the same, there is no incentive for the officer or prosecuting attorney to go through the trouble of getting a

warrant.

With the more deferential standard in warrant cases, the close call, and many are close calls, went to the officer who took the time to get the warrant. In United States v. Leon, 468 U.S. 897, 914 (1984), this Court stated:

> Because a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer `engaged in the often competitive enterprise of ferreting out crime,' (cite omitted), we have expressed a strong preference for warrants and declared that `in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.' United States v. Ventresca, 380 U.S., at 111.

In the Seventh and Eighth Circuits, eliminating the incentive to getting a warrant can only mean that more and more searches and seizures will be conducted without the prior judicial scrutiny which the Fourth Amendment favors.

As this Court has observed in Gates, at 236:

> ...the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.

When Spears was decided in 1992, three other circuits had ruled that the correct standard of review of a district court's determination of probable cause in a warrantless case was clearly erroneous. Spears cites to United States v. Fox, 902 F.2d 1509,1513 (10th Cir.), cert. denied, -U.S.-,111 S.Ct.199 (1990);

United States v. Williams, 897 F.2d 1430,1435 (8th Cir. 1990); and United States v. Santana, 895 F.2d 850, 852 (1st Cir. 1990).

It noted that the balance of the circuits review either exigent circumstances or consent for clear error. N.4. Two months after Spears was decided, the Tenth Circuit, in United States v. Bloom, 975 F.2d 1447, 1456 (10th Cir. 1992), muddied the waters considerably when it stated:

> We review a district court's findings of reasonable suspicion under a clearly erroneous standard...However, the question of reasonable articulable suspicion...should not be confused with the ultimate determination of reasonableness under the Fourth Amendment, which we review de novo. (Cite omitted). Thus, while the district court's factual findings concerning the agents' suspicion of criminal activity are subject to the clearly erroneous standard of review, (cite omitted), the question of whether such suspicion was reasonable under the Fourth Amendment is a question of law which we review de novo.

More recently, however, the Tenth Circuit while, upholding the clearly erroneous standard for findings of fact noted, "However, the ultimate determination of reasonableness under the Fourth Amendment is a question of law which we review de novo." United States v. Fernandez, 18 F.3d 874,876 (10th Cir. 1994).

In a subsequent First Circuit case, United States v. Rodriguez-Morales, 929 F.2d 780,783-84 (1st Cir. 1991), the court held that it would review mixed fact/law findings under the clearly erroneous test. No deference would attach if the lower court applied the wrong legal standard. Determinations of a "legal" kind would be subject to de novo review.

The Third Circuit stated in United States v. McGlory, 968

F.2d 309,342 (3rd Cir. 1992):

> We review the district court's finding of probable cause under the clearly erroneous standard. If the district court's ruling is plausible in light of the record viewed in its entirety, we must accept it, even if we would have evaluated the evidence differently in the first instance.

In a more recent third circuit opinion, the court stated it would review factual finding for clear error, but would "exercise plenary review over whether these facts create a reasonable inference that the suspect is dangerous and the protective frisk was reasonably calculated to discover a weapon." United States v. Edwards, 53 F.3d 616,618 (3rd Cir. 1995).

The Fourth Circuit applies the traditional clear error test for review of factual findings and an "independent determination on the legality of the arrest." United States v. McCraw, 920 F.2d 224,227 (4th Cir. 1990).

The Fifth Circuit has the same stated standard as the fourth circuit, that of independent review of the district court's conclusions of law. United States v. Richardson, 943 F.2d 547,549 (5th Cir. 1991). Accord, United States v. Martinez-Perez, 941 F.2d 295,297 (5th Cir. 1991). The court would "review de novo the ultimate conclusions of whether the fourth amendment was violated."

The Eighth Circuit stands solidly in line with the post Spears Seventh Circuit. "We review the District Court's findings of probable cause (to arrest) for clear error." United States v. Travis, 993 F.2d 1316,1324 (8th Cir. 1993). However, another panel in United States v. Saffeels, 982 F.2d 1199,1205 (8th Cir.

1992) would review a stop under the clearly erroneous test. However, "We would review de novo the issue of whether a seizure exceeded the permissible scope of an investigative stop." There was no discussion concerning the varying standards.

More recently, in United States v. Bobo, 994 F.2d 524,527 (8th Cir. 1993) the Eighth Circuit stated:

> We review a district court's determination of probable cause under the clearly erroneous standard and will affirm the court's decision unless it is not supported by substantial evidence or is based on an erroneous conception of applicable law, or if, after we consider the entire record, we are left with the firm and definite conviction that a mistake was made.

In the most recent advance sheet in West's Federal Reporter Third Series, dated July 3, 1995, the Eighth Circuit announced, "We may reverse the district court's ultimate ruling on the suppression motion, however, if the ruling reflects an erroneous view of the applicable law.'" United States v. Bell, 54 F.2d 502 (8th Cir. 1995). This suggests a backing away from the clearly erroneous standard stated in Bobo. What constitutes an erroneous view of applicable law is not stated. The Bell court analysis certainly has a ring of "clearly erroneous", but sounds less deferential.

The Ninth Circuit stated that it would review de novo the trial court's determination of the validity of a warrantless entry or arrest. United States v. Huguez-Ibarra, 954 F.2d 546 (9th Cir. 1992) and United States v. Puerta, 982 F.2d 1297,1300 (9th Cir. 1992).

The Tenth Circuit's decision in United States v. Fernandez, 18 F.3d 874,876 (10th Cir. 1994) is at variance with the earlier Tenth Circuit decision cited in Spears. In Fernandez, the court stated the "ultimate determination of reasonableness under the Fourth amendment is a question of law which we review de novo."

The Eleventh Circuit would apply the clearly erroneous standard to findings of fact; "but the application of law to those facts is reviewed de novo." United States v. Adams, 1 F.3d 1566,1577 (11th Cir. 1993).

Given the varying and contradictory standards of review among the circuits, some with their own tangents, this Court should announce a uniform standard of review of a trial court's ultimate legal conclusions in non-warrant cases. Petitioners believe the traditional de novo standard adhered to by the majority of circuits is the appropriate standard for a number of reasons. Historically, that has been the standard of review by appellate courts of conclusions of law, both in federal courts and among the states.

Wisconsin adheres to this standard in its state court decisions. See, State v. Swanson, 159 Wis.2d 431,445, 464 N.W.2d 680 (1991) (court will review "ab initio" whether defendant was under arrest at a particular time) and State v. Murdock, 155 Wis.2d 217,226, 455 N.W.2d 618 (1990) ("independent" review of circuit court's determination of proper scope of search incident to arrest).

Appellate courts traditionally owe their allegiance not to lower courts, but to the law. Their role has been to interpret and

occasionally develop new legal concepts, while at the same time offering lower courts and practitioners a unifying hand among divergent views in the lower courts. De novo review assumes that appellate courts are in at least as good if not better position to correctly interpret a given set of facts as applied to a legal concept.

State trial courts, in particular, frequently make on the spot decisions in the midst of evidentiary hearings without the benefit of briefs, the assistance of law clerks, or the luxury of time to research and reflect. They are often called upon to make crucial decisions in sometimes complex and emerging areas of Fourth Amendment law.

In Wisconsin, circuit courts are often required to rotate into different areas of the law, with the least experienced judges starting out handling misdemeanor and the felony criminal calendars. It is not at all uncommon that appellate courts, staffed by seasoned judges, review decisions made by judges who have frequently had very little criminal law experience.

With rotation forced upon circuit courts, more experienced judges who have spent years handling civil cases, are suddenly thrust into handling criminal cases. It is only logical then, that appellate courts should not defer to the legal conclusions of lower courts. This is particularly true <u>especially</u> in constitutional areas where substantial liberty interests area at stake.

Most of these same arguments apply to federal courts. Trial courts are overworked, understaffed, and often have precious little

time to decide complex issues. With criminal cases taking an ever greater percentage of the courts' docket, the likelihood increases that there will be divergent and conflicting views emerging from different trial courts.

The clearly erroneous standard exalts mediocrity. Why should and appellate court defer to a lower court when it would have decided the case differently in the first instance? If this is the case, the very function of the appellate court is seriously eroded.

The clearly erroneous standard should not be the standard of appellate review in those instances where vital constitutional rights are at stake. Persons facing extended loss of liberty have the right to expect that appellate courts should hold trial courts to the highest standards. Appellate courts should be free to independently review the ultimate legal conclusions of law. Since the Fourth Amendment is national in character, one uniform standard of review should apply for all Fourth Amendment non-warrant cases.

Analytically, the clearly erroneous standard is illogical. Either the defendant's Fourth Amendment rights were violated, or they weren't. Those rights should not have to be clearly violated for an appellate court to reverse. Under a common definition of clearly erroneous, the appellate court would even be able to disagree with the lower court, if it were the court of first instance, and still not reverse. This defies logic.

It is petitioners belief that a Fourth Amendment incursion should result in remedial action by the courts. It shouldn't matter whether the trial court's decision is clearly wrong or just

plain wrong. What matters is the conduct of the police, not the judiciary.

Until and unless the remedial purposes of the exclusionary rule are scrapped, appellate courts should continue to analyze cases with those purposes in mind. That is, were the officer's actions reasonable, or did the officer violate the defendant's Fourth Amendment rights? If the later is true, then appellate courts should exclude evidence secured in violation of the Fourth Amendment.

Appellate courts should continue to provide incentives to the police to get a warrant. The clearly erroneous standard destroys these incentives by making the standard of appellate review the same, whether a warrant is secured or not.

In the case at bar, the appellate court gave deference to a trial court which heard none of the testimony at the evidentiary hearing, which reviewed only the transcript of one of six law enforcement officers, and which reviewed none of the tape recordings of the evidentiary hearing.

Five other officers testified about either the events on the day of the arrest, or police and DEA procedures, as part of the defense's attack upon the reasonable conduct of the police. Interestingly, the trial held that there was reasonable suspicion for the stop. However, the district court neither heard nor read the testimony, nor listened to the recording of the evidentiary hearing of the two officers who were initially at the scene and who ran the NADDIS and motor vehicle checks. The only transcript which

the trial court read was that of Officer Luedke (App. 113). The trial court, therefore, had not reviewed all of the testimony relating to the stop.

Petitioners filed objections to the magistrate judge's recommendations on February 17, 1993, objecting to the findings concerning the initial stop, search of the car, and the stationhouse statements. Luedke did not testify at all about the NADDIS information because he arrived at the seen after the NADDIS check. Similarly, he did not have any information concerning the running of the license plate nor about whether the owner of the car was the same person described in the NADDIS check.

Twenty days later, on March 9, 1993, the trial court issued its decision on the motions to suppress. The balance of the transcripts had not been transcribed and filed until June 6, 1993, almost three months after the trial court's decision. The only transcript available was that ordered by the government of Officer Luedke's testimony. The transcript was prepared on February 4, 1993 and filed February 9, 1993.

The trial court is obligated to conduct a de novo review of those parts of the record for which there are challenges to the magistrate's recommendations. 28 U.S.C. § 636(b)(1)(B). The trial court utterly failed in its obligation to conduct a de novo review. Moreover, the Seventh Circuit failed in its obligation to ensure that such review was performed on remand. There is nothing in the record or the trial court's opinion which even suggests that the trial court reviewed these transcripts after

remand. Yet, the trial court made findings of fact concerning NADDIS, the NADDIS check by the other arresting officer, and the license plate check. Further, the trial court's findings served as the basis for the court's legal conclusions that reasonable suspicion and probable cause to search existed.

In their two appeals to the Seventh Circuit, petitioners urged the Seventh Circuit to review de novo the legal determinations of the trial court. "As this case demonstrates, the district court frequently makes a determination of probable cause in non-warrant cases without having heard a single witness or reviewed the transcripts of the proceedings." (Main brief on post remand appeal, p.4).

Under 28 U.S.C. §636(b)(1) the court may "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations." The district court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made."

Petitioners stated in their initial main brief at 2:

> Because the district court read only a portion of the transcript generated from the Magistrate Judge's hearing, the trial court's factual determinations shall be reviewed by the "no deference standard." United States v. McConny, 728 F.2d 1195 (9th Cir. 1984)... In this instance the `differing roles' of this appellate court is to review the record de novo to afford proper oversight.

Even the Eighth Circuit, which is solidly in accord with the Seventh Circuit's clearly erroneous standard of review, has

reversed cases where the trial court failed conduct a de novo review when objections were filed. In a post Raddatz case, Taylor v. Farrier, 910 F.2d 518,520 (8th Cir. 1990), the court stated, "In Branch v. Martin, 886 F.2d 1043 (8th Cir. 1989), we remanded a case to the district court because the absence of a transcript or, alternatively, a tape recording, of the evidentiary hearing made de novo review impossible."

Here, the Seventh Circuit reversed and remanded the case initially because the trial court made credibility findings not in accord with his magistrate judge. Once again, the trial court made ultimate legal conclusions without reviewing the transcripts of the testimony of other police witnesses. If the Eighth Circuit reverses for failure of the trial court to review the transcripts, what possible justification is there for the Seventh Circuit to accord the trial court the most deferential standard of review?

Under the clearly erroneous standard for legal conclusions, the exclusionary rule comes into play only where the judge's determination is believed to be clearly wrong. This concept misplaces the focus of the inquiry, upon the judges when it should be on the police conduct. This Court has stated in United States v. Leon, 468 U.S. 897,916 (1984):

> First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

Petitioners urge this Court to reject the Seventh Circuit's clearly erroneous test, affirm the de novo review standard adhered to by the majority of circuits, and remand the case to the Seventh Circuit.

ARGUMENT II. IT WAS A VIOLATION PETITIONERS' DUE PROCESS RIGHTS FOR THE TRIAL COURT TO REFUSE ACCESS TO THE RAW DATA COMPRISING THE NADDIS CHECK, WHICH WAS LATER USED TO JUSTIFY BOTH THE STOP AND SEARCH.

During pretrial discovery, petitioners requested that the government supply them with the raw data which comprised the NADDIS files on the two individuals who the government asserted were the subject of two NADDIS "hits." While conducting drug surveillance, Detective Pautz requested of the Drug Enforcement Agency (DEA) that a NADDIS check be conducted.

The DEA was given two names. Detective Pautz testified (R.44:34):

> I gave them the name I had received from the license plate listing, which was Miguel Ledesma Ornelas, and I gave them that address that I had received, I think it was San Jose, and I also gave them the name of the person that had registered, which was Ismael Ornelas, and the address that he had put down.

The DEA reported that NADDIS showed a "hit on Miguel Ledesma Ornelas, also known as Lemus-Ledesma, Miguel. Date of birth 9/29/45, 5'6'', 150 pounds, Hispanic male. Listed in their files as being a heroin dealer out of El Centro, California." (R.49:35,105). Pautz relayed this information to Detective Hurrle (R.49:106-107).

The NADDIS showed that "Ismael Ornelas Jr, from Tucson,

Arizona was a one thousand kilo a month cocaine dealer". (R.49:35). "And these were just the names that we received. Not necessarily the people that could have been in the [motel] room." (R.49:35).

In Detective Pautz's experience, the NADDIS response would typically have identifying information, height, weight, date of birth (49:110-111). He testified the extent of such information varied depending on the information in their files.

The errors committed by the officers were numerous. First, because the dispatcher misread the California Department of Motor Vehicles registration, he relayed to Pautz a name, reversing the two last names of the car's owner. The registered owner of the car was not Miguel Ledesma Ornelas, the name in the NADDIS computer, but Miguel Ornelas Ledesma. Detective Hurrle, Pautz's partner, wrote the name down in his offense report as Miguel Ledesma Ornelas of 830 North 16th St., San Jose, California (R.49:102).

Pautz was asked if he understood that persons of Hispanic decent frequently use two family names. He responded, "I know that it was my understanding that they oftentimes use their mother's maiden name. However, I could be wrong on that...I guess I don't have a good understanding of it, is what I am telling you." (R.49:98).

Officer Pagan, of Hispanic decent, who acted as the translator for Saul Ornelas' interrogation, testified that persons of Hispanic decent who use both last names use their father's last name first, and their mother's last name second. This is how the "vast majority" of the people use the last names, although he has

occasionally observed a situation in which the mother's name would be used first (R.50:290).

The resident alien card and California drivers license of Miguel Ornelas-Ledesma, were attached to the affidavit of Ismael Ornelas-Ledesma, which was attached to the Motion to Supplement Brief, filed January 15, 1993 (R.18). That affidavit states that the petitioner's name is Ismael Ornelas Ledesma. §1. His father's last name is Ornelas, and his mother's last name is Ledesma, §1. It further states:

> Neither I nor my siblings would ever be correctly called Ledesma Ornelas, as the government has stated in the Indictment. Someone else might be Ledesma Ornelas, but that person would have a father whose family name is Ledesma and a mother whose last name is Ornelas.
>
> My brother's name is Miguel Ornelas Ledesma...I have never lived in Tucson, Arizona. Nor am I a junior. As stated above, my father's name is Guadalupe, not Ismael.

Before leaving on another assignment, Pautz told Hurrle that the NADDIS response showed that Ismael Ornelas was from Tucson, Arizona (R.49:122-123).

The second error was in not seeking to verify whether the registered owner of the car was the same person as the NADDIS hit. Pautz could have easily inquired as to the date of birth of the owner of the car, to confirm whether the car owner was also the subject of the NADDIS hit, whose DOB was given.

Pautz said he didn't ask his dispatcher to get a DOB from California, "because I didn't think that they could get that

information from California, and I don't know that they could today." (R.49:58).

Sergeant Wiggins, of the Milwaukee County Sheriff's Department is in charge of communications on the second shift. He affirmed that an "integral part of the communications bureau is to provide a link between officers on the street and other information which may be available from other law enforcement agencies via computer or otherwise." (R.50:356).

He testified his office can interface with computers from the departments of motor vehicles of all 50 states, including Canada. "We can get back in a given amount of time any record, motor vehicle record, driving record, registration." (R.50:357).

His office has been able to do this interface with other states' DMV records for a long time, possibly 10 or 15 years, maybe even 20 years (R.50:358). Contrary to Pautz's assertions, he not only was able to get a date of birth for the person who registered the car, but affirmed, "All the officers on the street know about the [regular DMV] system and how it's used, and use it on a regular basis." (R.50:358).

In fact, the government stipulated "that Detective Pautz could have determined the date of birth of Mr. Miguel Ornelas Ledesma by making administrative inquiry, via dispatcher, at the California Department of Motor Vehicles". (R.49:16). Certainly a police detective of nine years and 20 years on the force would know that this identifying information is readily available. His explanation for not doing this cross-check, given the differing residences, is

incredible.

Wiggins was asked to run a check on the California car in question. His initial response gave a name, address and make of car. This was the same information which Pautz had received. (R.50:360, Exhibit F). To receive further identifying information, he had to make a second, "administrative" request via computer. The administrative response showed the registered owner as, "L-e-d-e-s-m-a, Miguel Ornelas. Sex is male. Date of birth of 09/19/63, height of 5'6'', weight of 145 pounds, hair brown, eyes brown." (R.50:362, Exhibit G).

Wiggins was asked to compare this identifying information with a resident alien card and California drivers license supplied to him by the defense. The drivers license name was, "M-i-g-u-e-l, O-r-n-e-l-a-s." The dates of birth were the same. On the resident alien card, "his last name is spelled O-r-n-e-l-a-s, middle name of L-e-d-e-s-m-a, and Miguel, M-i-g-u-e-l." There is a hyphen between Ornelas and Ledesma on the resident alien card. (R.50:363).

On cross examination Pautz said it didn't cause him concern that the person on the NADDIS hit had a completely different address than the person who was the purported owner of the car (R.49:58). He said this, notwithstanding the fact that he had no idea where El Centro or San Jose were, other than he believed that both were in "southern California."

Pautz testified that he didn't think the person who registered at the motel was a "Jr.," as was shown on the NADDIS response. He further stated that he thought the motel registrant listed himself

as being from California, not Tucson, Arizona, as was shown by NADDIS (R.49:60).

When making the NADDIS request, he did not know if he asked for a date of birth for Ismael Ornelas. He did not recall asking for a description of the person. He further did not recall asking for additional information surrounding the alleged cocaine trafficking (R.49:61).

There were no wants or warrants for the car's owner in any state. Similarly, there were no wants or warrants for the person whose name was on the motel register anywhere in the country. (R.49:61). Pautz did not know of any wants or warrants for the two persons listed in the NADDIS response (R.49:61).

In his drug profile factors, Pautz testified that the major source states for cocaine were, "Arizona, California, Florida, Texas, maybe New York. Some of the minor would be maybe New Jersey, Louisiana, a few others...maybe five others." (R.49:62). The magistrate judge took judicial notice that the combined population of those major states according to the 1990 Census was 81,340,130. California had a population of 29,760,021.

Petitioners sought the information which was stored in the DEA's computers, and which constituted the basis for the NADDIS hits. The government refused to provide such information and accordingly, petitioners filed a motion to compel (R.16,11). Petitioners requested the entire file of the DEA concerning the individuals named in the hits. Both the magistrate judge and the trial court refused to compel production (App. C-110) and (App. E-

120). Petitioners argued that the denial of access resulted in an infringement of due process rights.

The initial Seventh Circuit decision did not address the petitioners' due process arguments. On the second appeal, the Seventh Circuit again did not address the argument. In the first appeal, Chief Judge Richard Posner remarked at App.152, "It would be nice to know something about NADDIS, but the government successfully opposed the defendants' efforts to obtain discovery aimed at determining the character and reliability of the information in the NADDIS data base, and as a result the record is bare of evidence about it."

In Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed. 2d 301 (1990), this Court was similarly faced with the question of the worth of an anonymous tip in the context of a Terry stop. This Court stated, 110 S. Ct. at 2416:

> Reasonable suspicion, like probable cause, is dependent upon both the content of the information possessed by the police and its degree of reliability. Both factors-quantity and quality-are considered in the "totality of the circumstances-the whole picture," United States v. Cortez, 449 U.S. 411, 417 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), **that must be taken into account when evaluating whether there is reasonable suspicion." Thus if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. (Emphasis added).**

Both the district court and Seventh Circuit utilized the NADDIS information as a necessary component in its determination that the police had reasonable suspicion to stop petitioners and

probable cause to dismantle the car.

The Seventh Circuit's first decision, (App.151), states, "Clearly, were it not for the NADDIS hits, the officers would not have had grounds for reasonable suspicion that the defendants were drug traffickers." Although the appellate court relied upon the NADDIS hits, it questioned the reliability of such information, "we have found no considered judicial assessment of its reliability, although we have found occasional judicial expressions of concern about that reliability." (App.152-53).

> Maybe NADDIS is no better that a vast compendium of rumors, errors, and libels: garbage in, garbage out. That seems unlikely. It would not be heavily used by drug enforcement authorities if it were merely a random sample of the American population. Which is not to say, however, that it is highly reliable; concern that it may not be is heightened by the (scanty) secondary literature, which depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated. See UPI Release, "VIP names in Drug Agency's Computer Files." July 3, 1984; Vanessa Jo Grimm, "Behemoth DEA Database Tracks Drug Smugglers," Government Computer News, July 8, 1991, p.85. According to the UPI Release, as of 1984 NADDIS contained 1.5 million names, obtained from debriefings of informants and suspects and from surveillance and intelligence reports of various law enforcement agencies.
>
> As an example of NADDIS's possible unreliability, we note that according to it Ismael Ornelas, Jr., of Tucson, a 1000 kilogram a month dealer-a large dealer is not wanted by any law enforcement authority in the country. Maybe that Ornelas (who is neither Saul Ornelas nor Ismael Ornelas-Ledesma nor the registered owner of the Olds) died years ago or is some practical joker's or desperate informant's fictional creation or is an honest man falsely accused by an enemy.

The court of appeals continued at (App.153):

> Because the reliability of information stored in NADDIS is unknown, that information must, on the record before us, be reckoned no more reliable than that of an informant not known to be reliable. Therefore, since an

uncorroborated tip from such an informant cannot by itself furnish probable cause for an arrest or search, Illinois v. Gates, 462 U.S. 213, 227, 103 S.Ct. 2317, 2326, 76 L.Ed.2d 527 (1983), an unverified, uncorroborated entry in NADDIS cannot do so either.

The court of appeals determined however:

> Standing alone, the drug courtier profile that first aroused Pautz's suspicions was very little. Standing alone, one NADDIS "hit" could not, in the absence of any evaluation of NADDIS's reliability, be thought much either, The second "hit" however, added to the credibility of the first; and together the profile and the "hits," though still not enough evidence of crime to furnish probable cause to search the car, could satisfy the lesser showing required for a Terry stop. (App.154).

It is petitioners' contention that the NADDIS information which the officers possessed at the time of the stop was not shown to be sufficiently reliable so as to have allowed its use in the determination of reasonable suspicion, as outlined in Alabama v. White, 496 U.S. 325 (1990) and Illinois v. Gates, 462 U.S. 213 (1983).

Under the Gates totality-of-the-circumstances test, "a deficiency in one factor [the informant's veracity or reliability], may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." 462 U.S. at 233. Even if the NADDIS information was deemed sufficiently reliable to be a part of the Gates formula, there was lacking a "strong showing" in the other components; the drug courier profile, and the somewhat loose panel in a twelve year old car.

When petitioners sought the underlying data comprising the NADDIS information which had been supplied to the officers, they

repeatedly asserted the need to know what information was contained in the NADDIS records, i.e.; the age of the information, and the reliability of the information (R.46:395,398,403). They were looking for concrete facts for a reviewing magistrate to be able to assess the reliability of the information. The government refused to turn over this information claiming that no hard copy of the data was ever generated when the officers requested it, and thus there was nothing to give petitioners (R. 14:3).

The information sought and denied was relevant to a determination whether there was reasonable suspicion to justify the investigative stop and subsequent search. It's relevance can be seen by the decisions of the magistrate judge, the trial court, and the court of appeals, each of which relied upon the NADDIS information to justify the Fourth Amendment incursions.

The NADDIS information might have revealed pertinent facts such as whether these two individuals were dead or in prison, (which is not an unlikely scenario for drug dealers). The information, and the raw files comprising the basis of the NADDIS hit would, in all probability, have had dates necessary to establish whether the information was current, stale and/or unreliable. DEA agent Allen, called as a defense witness, stated, "If there was information or intelligence, many times that has a date behind it." (referring to NADDIS information) (R.46:396).

Identifying information from NADDIS, if it existed, would have conclusively shown that the petitioners were not the NADDIS individuals. Moreover, general intelligence information may well

have been dated. This would have allowed both the police officers and the courts to subsequently evaluate the probative value of the information.

It should be noted that on 12-30-92 Ismael Ornelas asked not only for the NADDIS information on both individuals, but also the "entire" file of the DEA concerning both individuals (R. 11:2, §4 and §5). Petitioners filed a joint objection to the magistrate's ruling. The district court summarily upheld the magistrate's order (Appendix 110-111).

There is no question that the "Miguel," referred to by NADDIS, and Miguel Ornelas, owner of the car, were two separate persons. Their dates of birth were off by 18 years (R.45:362)(R.44:35). Similarly, Ismael Ornelas, by affidavit, in his objections to the magistrate's order concerning discovery, asserted that he never lived in Tucson and that his father's name is Guadalupe, not Ismael. As such, he is not a junior (26:App.109). Clearly, petitioners had made a showing that the information sought was relevant.

The DEA agent was subpoenaed to provide the NADDIS information for the evidentiary hearing. The agent did not bring the material subject of the subpoena. The magistrate judge denied petitioners repeated requests for this information while DEA agent Allen was on the stand (R.51:398,403).

The material was retrievable within minutes, as the DEA office was located on the same floor as the magistrate judge's courtroom. Agent Allen testified that some of this material may reflect the

day on which it was received by NADDIS. The age of the information was crucial in an examination of whether it was stale for Fourth Amendment purposes (R.51:398).

In United States v. Bagley, 473 U.S. 667 (1985), this Court stated that prosecutors must, "disclose evidence that the defense might have used to impeach the Government witnesses...Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972)."

In denying petitioners' requested discovery, the magistrate judge merely stated that the petitioners failed to establish that they were entitled to the information under Brady v. Maryland, 373 U.S. 83 (1963), or under Fed.R.Crim.P. 16. (A-120-21). In so doing, there was no discussion or factual or legal analysis.

In responding to the objections that the magistrate judge's ruling, the trial court merely stated the order denying the motion to compel "was not clearly erroneous or contrary to law, and further adopts and incorporates here by reference the reasoning contained in that Order..." (A-111).

Petitioners maintain that the refusal to grant access to the NADDIS raw data precluded the presentation of a defense. Moreover, had they had access to such information, they would have defeated the assertion that the arresting officers had reasonable suspicion to stop and probable cause to search the car. The trial court's refusal to compel constituted an impingement upon fundamental due process rights.

A defendant has the constitutional right to present witnesses to establish a defense. This right has been termed "a fundamental element of due process of law." Taylor v. Illinois, 484 U.S. 400 (1987). Taylor, at 409, instructs, "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

The asserted reason of the government for not providing the NADDIS information was that since the officer received the information verbally from the DEA, there was not a hardcopy of the information to give. This argument did not address whether the requested raw data information sought did, in fact, exist. Petitioners considered this response pretextual and moved to compel.

The magistrate judge ruled:

> In response the government has indicated that neither NADDIS nor the motor vehicle license plate information were ever printed out from the computer and has proffered affidavits in support of this response. Since the materials which the defendants seek do not exist, they obviously cannot be disclosed. (App.120).

The trial court summarily affirmed the magistrate judge, ruling the order "was not clearly erroneous or contrary to law, and further adopts and incorporates here by reference the reasoning contained in that Order..." (App.111). The court of appeals twice did not rule on this due process argument.

Issue No. I. in petitioners' second appeal to the Seventh Circuit states, "Whether the Trial Court's refusal to allow appellants access to the raw data comprising the NADDIS information

deprived appellants of due process rights." Issue No. II. in the original appeal states, "Whether appellants' due process rights were abridged by the trial court's refusal to allow access to the NADDIS information?"

The court of appeals' initial response was, "The other grounds raised by the appellants have too little merit to warrant discussion." (App.157). No response was had in the second appeal.

United States v. Hensley, 469 U.S. 221, 232 (1985) provides that police may stop persons who are the subject of a police broadcast by other police agencies so long as the broadcasting agency can articulate facts establishing reasonable suspicion. Thus, what information the other agency actually possesses is not only relevant but necessary when a defendant later challenges the stop.

Since all reviewing courts relied on the NADDIS information to provide the essential facts to justify the stop and later search, petitioners were entitled to know the basis of the information in the original agency's files. How old was this material? Who supplied the information? Was this person reliable or credible? What is the current status of these persons? How frequently does NADDIS material get purged? Were these dealers engaged in selling drugs in the 1970's, 1980's or 1990's.

We know absolutely nothing about this age or quality of the NADDIS information. We do know that had the dispatcher not reversed the last names of one of these persons, one of the NADDIS "hits" would not exist.

Had the officer made the most basic attempt to corroborate the identity given by NADDIS with the identifying information from the California DMV, he would have known that the DOB's were 18 years apart. His failure to do this basic cross-check resulted in an investigation which was improperly conducted.

As this Court has held in Maryland v. Garrison, 480 U.S. 79,85 (1978), "The validity of the warrant must be assessed on the basis of the information the officers disclosed, or had a duty to discover and disclose, to the issuing magistrate." In Garrison, at 81, the search of the wrong apartment was sustained because the police conducted a reasonable investigation, including "verification of information obtained from a reliable informant, an exterior examination of the three story building...and an inquiry of the utility company."

Here, the police failed to conduct a cross check about information from NADDIS about which he knew nothing; in terms of age, reliability, or quality. A simple check with the California DMV at least would have verified whether the NADDIS Miguel Ornelas was the registered owner of the car. Had he merely done this, he would have learned that they were not the same persons. Further, we do know that at the time of the stop, the officers learned that the other person, Ismael Ornelas was from California, and not Tucson, Arizona. They further learned, prior to the search, that neither petitioners nor the NADDIS individuals were currently "wanted" by police authorities.

The Seventh Circuit relied on the fact that there were two

hits. The second hit tipped the scale in favor of affirming the district court on a clearly erroneous basis. This reliance was, however, misplaced. The first hit was a result of the police's bungling and unreasonable investigation. The second hit, with no identifying data, provided a similar name but differing state of residence, thereby casting doubt on its reliability.

The ultimate Fourth Amendment question is whether the police action was reasonable. The government must comply not only with the Fourth Amendment, but also with the Fifth Amendment's Due Process Clause. The police knew absolutely nothing about the reliability of the NADDIS information, and the government refused to disclose what information it knew.

Pautz was asked whether, if there was "identifying" information, it would necessarily be on the NADDIS computer. The government objected to such inquiry, arguing that Pautz could only testify to what he was told (R.44:111). The magistrate judge correctly responded, "You mean he's using some information he doesn't know how they go about getting it, doesn't know about the reliability of it? Is that what you are telling me about this officer, that he's using information that he doesn't know anything about?" (R. 44:111).

The government responded, "He's told the information. It's my understanding they are not allowed to view the [NADDIS] screen. That they are told the information."

THE COURT: But the point is, Ms. Fleming, doesn't it go to reasonable suspicion? If he doesn't know whether or not it's

reliable or not, doesn't that go to whether or not the officer can have reasonable suspicion?" (R.49:111).

Without NADDIS, neither the stop nor the search were legal. The Seventh Circuit stated, "The fact that a door panel is loose does not by itself create a reasonable likelihood that the panel conceals a secret compartment containing contraband. (Cite omitted). Here as in most cases there was more, but not much more: mainly the NADDIS "hits" of unproven reliability." (App.155-56).

We have come far too close to George Orwell's scenario in 1984 when the government can justify a stop and dismantling of a car on the basis of a drug courier profile, a somewhat loose panel on a twelve year old Oldsmobile, and secret information which the government refuses to disclose, about which we know nothing.

Further, due process is offended when two persons can be sentenced to long prison terms on the basis of secret information from a government computer which fellow law enforcement officers are not allowed to view. If the police officer who requests this information cannot view the screen to independently assess its reliability, and the information is subsequently withheld from defense counsel and the courts how can this information possibly tip the scale to satisfy the "reasonable" requirement of the Fourth Amendment or the Due Process Clause of the Fifth Amendment?

This decision is offensive to the ideals of an open, democratic country. As this Court states in Gates, 462 U.S. at 238, "And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for...conclud[ing] that

probable cause existed." If we hold magistrates to that standard when the officer requests a warrant, certainly reviewing courts should hold themselves to at least that standard when the officer acts without prior judicial authority.

We cannot say that the officer possessed a substantial basis for concluding he had probable cause to search the car because we know nothing about the NADDIS information.

If in 1984 there existed 1.5 million names in NADDIS computer, one can only speculate on its current size. If the increase in drug cases handled in federal court in the last eleven years is any indication, the list probably now contains millions of names. Each of these persons is at risk by this decision. Thousands of people whose names are in the NADDIS files may well be "honest m[e]n falsely accused by an enemy," or persons who happen to share similar names. This is precisely the reason why greater scrutiny should be required by this Court, than that which the Seventh Circuit has required.

Conclusion and Prayer for Relief.

Petitioners respectfully submit that this petition for certiorari should be granted and a writ of certiorari issued to review the judgment and opinions of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Eastern District of Wisconsin.

Respectfully submitted,

Brian W. Gleason, Counsel of Record for Ismael Ornelas-Ledesma

230 W. Wells Street, Suite 702
Milwaukee, Wisconsin 53203
(414) 277-5076

Robert G. LeBell, Counsel of Record for Saul Ornelas

100 East Wisconsin Avenue
Suite 1700
Milwaukee, Wisconsin 53202
(414) 276-1233

TABLE OF CONTENTS TO APPENDIX

Decision and Order of the trial court, September 20, 1994.....A-95-99

Magistrate Judge's Post-Remand Recommendation to the Honorable Rudolph T. Randa, March 29, 1994.....B-100-109

Order of Rudolph Randa denying motion to compel discovery, dated February 9, 1993.....C-110-111

Decision and Order of Rudolph Randa, denying motions to suppress statements and evidence, dated March 9, 1993..... D-112-119

Memorandum and Order Re: Defendants' Motion to Compel Discovery by Magistrate-Judge Bittner, dated January 15, 1993..... E-120-121

Magistrate Judge's Recommendation to the Honorable Rudolph T. Randa and Order, dated February 12, 1993... F-122-141

Judgment of Conviction of Ismael Ornelas-Ledesma.....G-142-143

Judgment of Conviction of Saul Ornelas.....H-144-146

Unpublished Decision and Order of the United States Court of Appeals for the Seventh Circuit, dated April 18, 1995.....I-147-148

Published Decision and Order of the United States Court of Appeals for the Seventh Circuit, dated February 10, 1994, vacating judgments and remanding to the district court.....J-147-157

Judgment-Without Oral Argument, of the United States Court of Appeals for the Seventh Circuit, dated April 18, 1995.....K-158

Copy mailed to attorneys for parties by the Court pursuant to Rule 49 (c) Federal Rules of Criminal Procedure.

FILED
U.S. DISTRICT COURT EAST. DIST. WI
SEP 2 0 1994
AT ____ O'CLOCK ____
SOFRON B. NEDILSKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 92-CR-243

SAUL ORNELAS and
ISMAEL ORNELAS-LEDESMA,

Defendants.

DECISION AND ORDER

This matter comes before the Court on remand from the Seventh Circuit for purposes of additional fact-finding and reconsideration of the probable cause issue. The facts of the case, with one addition, are as stated in the initial Magistrate's recommendation dated February 12, 1993, which the Court adopts and incorporates here by this reference.

On February 12, 1993, Magistrate Judge Robert L. Bittner issued a recommendation that defendants' motions to suppress the cocaine at issue be denied. The Magistrate's recommendation was not based on the existence of probable cause. Rather, the Magistrate found that the case fit within the "inevitable discovery" exception to the probable cause requirement. In a decision dated March 9, 1993, this Court upheld the Magistrate's recommendation, but on different grounds. This Court found that the drug courier profile, the two NADDIS hits and the loose door panel, constituted probable cause to remove the door panel and search for drugs. The defendants entered conditional pleas and appealed the suppression issue. The Seventh Circuit vacated the decision on grounds that this Court incorrectly thought the Magistrate had ruled upon the credibility of Officer Luedtke's testimony concerning the loose door panel. The Circuit Court then gave explicit instructions regarding what was to be done on remand:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedtke's testimony on the loose panel himself (or at least view the car interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedtke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel.

United States v. Ornelas-Ledesma, 16 F.3d 714, 721-22 (7th Cir. 1994).

On remand, this Court again referred the matter to the Magistrate for purposes of making an initial determination regarding the credibility of Officer Luedtke's testimony and the existence of probable cause. The Magistrate found Officer Luedtke's testimony regarding the loose door panel credible, and this Court accepts that finding. The Magistrate further found, however, that adding the loose door panel to the drug courier profile and the two NADDIS hits was not sufficient to establish probable cause. This is contrary to the Court's original conclusion, which

found that "reasonable suspicion became probable cause when Officer Luedtke found that the right rear door panel of the car was loose."

The Court acknowledges that the issue is a close one, but weighing the evidence "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement," see Texas v. Brown, 460 U.S. 730, 742 (1983), the Court is compelled to reach the same conclusion. Both the Seventh Circuit and the Magistrate raised concerns regarding the broad brush of drug courier profiles, the reliability of the NADDIS system, and the significance of a loose door panel in a 12-year old car from General Motors. Viewed individually, these facts may be unremarkable. They become more meaningful when, in a specific case, they converge and form around two specific individuals. That is what happened here. The question is whether, based on that confluence of facts, Officer Luedtke was reasonable and justified in his belief that drugs lay within the defendants' car door. In answering this question, the law says that Officer Luedtke and his actions are not to be judged in hindsight. This means that his search is not justified by the fact that he was right. It also means that his search is not invalid simply because the names on the two NADDIS hits were not absolutely identical to the names provided, or because the addresses did not match up, or because the other information he relied upon was relatively innocuous when considered alone. The test is one of flexibility and common sense, requiring only "practical, nontechnical probabilit[ies]". Id.

This case strikes the Court as an example of how common sense translates into good and constitutionally valid police work. As the Seventh Circuit noted, "Milwaukee police keep a regular watch on motels, looking for drug runners." Ornelas-Ledesma, 16 F.3d at 715. This makes sense, and this is what the officers were doing here when they discovered defendants' older model, two-door GM car with source state license plates. A routine survey thus became a hunch. An examination of the motel registry showed that the car was driven by two men who checked into the motel at 4:00 a.m. without advance reservations. The hunch thus grew stronger.[1] Then a NADDIS check on the registered owner of the vehicle scored a hit on a known or suspected heroin dealer, although the addresses did not match up. The hunch ripened into generalized suspicion. A NADDIS check on the name listed in the motel registry also scored a hit on a prolific cocaine dealer, although the addresses again did not match up and there was a "Jr." designation appended to the name retrieved by NADDIS. Nonetheless, two NADDIS hits on names virtually identical to those uncovered by the officers were too impressive to be coincidental. Generalized suspicion thus became reasonable suspicion directed at two specific individuals. After the resulting Terry-stop, one of the suspects produced identification containing the name of the NADDIS cocaine dealer. Suspicions were confirmed and reinforced. Officer Luedtke asked for permission to search the vehicle. Consent was given. During a general search of the interior, Officer Luedtke discovered a loose door panel near the right rear seat.

What was Officer Luedtke to do? At this juncture, every additional step turned up additional information which dispelled doubt about the innocent nature of the facts and made the officers' suspicions stronger and more probable. Should Officer Luedtke have stopped at that point simply because a loose door panel on a 12-year old car, considered by itself, is likely to be a common occurrence? Or, does

[1]While the Seventh Circuit recognized these facts as "innocent taken by [themselves]," Ornelas-Ledesma, 16 F.3d at 716, they do not preclude the officers from developing their intuition.

Officer Luedtke view the loose panel as the accumulated evidence directs him to view it, as his experience has told him to view it, and as a number of cases have also viewed it; "[A]s a telltale sign of drug running"? Id. at 720.[2] A competent police officer removes the door panel. He removes it because it is the final fact in a string of unbroken facts which establishes the probable cause equation.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The Government's objection to the Magistrate's recommendation is sustained and the defendants' motions to suppress are denied.

Dated at Milwaukee, Wisconsin, this 26th day of September, 1994.

SO ORDERED,

HON. RUDOLPH T. RANDA
U. S. District Judge

[2]See Magistrate's Recommendation dated February 12, 1993 at 6-7 ("Based upon his training, Luedtke suspected the panel had been removed and contraband was hidden inside)

AO 72A

C... for
P... t
to ... of
Criminal Procedure.

U.S. DIST. COURT EASTERN DIST. WI
FILED
MAR 29 1994
AT 9:35 O'CLOCK M
SOFRON B. NEDILSKY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISMAEL ORNELAS-LEDESMA and SAUL ORNELAS,

Defendants.

Case No. 92-Cr-243

MAGISTRATE JUDGE'S POST-REMAND RECOMMENDATION TO THE HONORABLE RUDOLPH T. RANDA RE: DEFENDANTS' MOTIONS TO SUPPRESS

NATURE OF CASE

On February 12, 1993 this Court issued a recommendation on motions to suppress physical evidence filed by defendants Saul Ornelas and Ismael Ornelas-Ledesma. In addressing the defendants' motions to suppress, this Court concluded the defendants were lawfully subjected to an investigatory detention based upon reasonable suspicion and clearly consented to a search of the 1981 Oldsmobile. However, this Court further concluded that, under governing case law, the consent did not extend to the door panels and a search of those door panels was not supported by requisite probable cause, because the testimony of Milwaukee County Deputy Sheriff Lyle Luedke, regarding the presence of rust in the groove of the Phillips screw used to attach the vent cover to the door, was not credible. Nonetheless, this Court recommended denial of the defendants' motions to suppress evidence,

since the seizure of cocaine fell within the inevitable discovery exception to the Fourth Amendment exclusionary rule of Nix v. Williams, 467 U.S. 431, 433 (1984).

Subsequently, in a March 9, 1993 order, United States District Judge Rudolph T. Randa considered the defendants' objections to the recommendation and ruled the holding regarding inevitable discovery was unnecessary, because the facts found by this Court established probable cause to remove the door panel vent cover and search the compartment behind it. Thereafter, Judge Randa accepted conditional pleas of guilty, pursuant to Fed. R. Crim. 11(a)(2), from the defendants who then appealed the adverse suppression decision.

The Court of Appeals for the Seventh Circuit issued a decision in the matter on February 10, 1994 vacating the defendants' judgments of conviction and remanding the case for further proceedings consistent with its opinion which holds:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw.

United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405 (slip op. at 15) (7th Cir. Feb. 10, 1994). On March 15, 1994 Judge Randa,

in turn, referred the matter to this Court for further proceedings in accord with the directions of the Court of Appeals.

DISCUSSION AND ANALYSIS

In its recommendation, this Court made the following findings of fact:

> When Hurrle announced he had completed the search of the trunk, with negative results, Luedke proceeded to the passenger area of the vehicle and checked to see whether the back seat was loose. Upon finding it was not, he examined the right rear quarter panel near the handle. He found this panel to be loose. Based upon his training, Luedke suspected the panel had been removed and contraband was hidden inside. Luedke testified he then observed the vent area of the door, noticing the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led him to believe the vent cover had recently been removed. Luedke then released the screw, dismantled the vent area of the door, and exposed a cavity approximately five (5) inches high and four (4) inches wide which contained a paper bag in which he felt a hard block.

(Emphasis added.) (February 12, 1993 Recommendation at 6.)

Officer Luedke's testimony as to the screw was found by this Court to be incredible, in light of the undisputable condition of the screw itself. Nonetheless, except for the rule of Falsus In Uno Falsus In Omnibus, I have no reason not to believe the panel was loose. Thus, I accept as credible Luedke's testimony that the panel was loose. However, the loose panel alone, given the age of the Oldsmobile, is not probative evidence of the fact it necessarily had been recently removed. See United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405, slip op. at 13 (observing the interior of a

1981 Oldsmobile, unlike that of a Rolls Royce, is apt to be rather worn and battered after eleven [11] years).

So what else is there besides the loose panel to establish probable cause that the compartment had recently been opened and contained contraband. Answer: Only the two (2) NADDIS "hits" and the questionable "drug courier" profile consisting of the facts the defendants were Hispanic Californians driving a two-door General Motors car who had checked into a motel very early in the morning, traveled as a pair rather than alone, and had not made advance reservations. See United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405, slip op. at 5 ("confluence of the circumstances is pretty innocuous . . . especially since many of the circumstances are correlated rather than independent"). The NADDIS computer reports showed a "hit" on Miguel Ledesma Ornelas, also known as Miguel Lemus-Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car; and a second "hit" on Ismael Ornelas, Jr., of Tucson, Arizona who was reported to be a 1,000 kilogram per month cocaine dealer, although no "wants" or warrants were outstanding against him. Thus, the NADDIS reports are so convoluted and mismatched that they are of little probative value in the probable cause determination. Consequently, the only evidence in the probable cause calculus is the loose panel, a weak drug courier profile, and inconclusive NADDIS "hits." There is just not enough evidence for a reasonable law enforcement officer to believe the door compartment contained contraband, as opposed to being a mere

sign of an aging General Motors automobile. See State v. Swanson, 838 P.2d 1340, 1345-48 [Ariz. App. 1992]) (no probable cause to believe evidence of crime would be found in the space behind door panels; the screws of which appeared to have been tampered with and were loose, where only other facts were defendant became nervous when the officer opened the vehicle door, and supposed "drug courier profile" consisted of facts that defendant and his passenger were traveling east on an interstate highway in a rental car with electronic paging equipment and a cellular phone). Missing are any additional indicia requisite to a finding of probable cause, as noted in the following cases. See United States v. Lugo, 978 F.2d 631, 637 (10th Cir. 1992) (suggesting probable cause to search behind door panels may have existed because totality of circumstances suggested the hidden space contained contraband: defendant was armed, traveling interstate, did not have luggage or other articles normally associated with such a trip; displayed noticeable interest in locking his truck after being told by officers not to; had a weapon within easy reach along with a fully loaded clip, and additional ammunition on the floor of the trunk; and there was a loosened door panel with a creased edge indicating someone had accessed the cavity inside); United States v. Pena, 961 F.2d 333, 339 (2nd Cir. 1992) (defendant entitled to evidentiary hearing on whether probable cause existed for search of door panel where facts in addition to those furnishing reasonable suspicion for investigatory detention were "asserted discovery of an empty bag and screwdriver in the back seat of detained automobile"); United States v. Arango, 912 F.2d 441, 447

(10th Cir. 1990), cert. denied, 499 U.S. 924 (1991) (probable cause for arrest where officers noticed truck bed did not seem right because it was very shallow, after lifting the tailgate corner of a rubber mat covering truck bed, observed that truck bed had apparently been modified; their knocks on truck bed suggested hidden compartment was running beneath the bed; and defendant had inadequate amount of luggage for purported two [2] week vacation); United States v. Garcia, 897 F.2d. 1413, 1419 (7th Cir. 1990) (upholding search of door panels when, while conducting consensual visual search, officers noted lack of window cranks and door handles mismatched and ill fitting screws on the door panels, and spotted packages inside the door while looking through the window opening); United States v. Thomas, 787 F.Supp. 663, 684 (E.D. Tex. 1992), aff'd without op., 983 F.2d 1062 (5th Cir. 1993) (probable cause to open exterior side panels of vehicle based on drug sniffing dog's strong alert); Munguia v. State, 737 S.W.2d 658, 660 (Ark. App. 1987) (marijuana residue on car floor boards and loose fitting door panel warranted reasonable belief additional marijuana would be found in door panel).

In its opinion, the Court of Appeals also suggested the Court might wish to consider the evidence of the loose panel in conjunction with the Phillips screw which, upon examination by the Appellate Court, "looked as if it had been scratched in just the way one would expect if it had been removed and reinserted", though also noting its appearance could "reflect its removal by Officer Luedke or other handling since." United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405, slip op. at 15. However, the parties orally

stipulated to resolution of the matter based upon the prior record.

Review of that record discloses Luedke "used a small pocket-type knife to remove the Phillips screw from the plastic vent cover" (Tr. 156). Luedke further testified "a closer examination of that screw indicated there was rust in the area of the Phillips head of the screw" (Tr. 155-156). When the screw was brought to this Court for examination, it was contained in a film canister which was fitted with cotton (Tr. 423). The record regarding the condition of the screw and the source of any scratches on it which the Court of Appeals observed is inconclusive. Based on the parties' stipulation, this Court has not reexamined the screw and the record is insufficient for this Court to make a determination of when or how the screw was scratched. Consequently, any scratches on the screw have no impact on this Court's determination that there was not probable cause for the search of the door panel.

It may be that, based upon this Court's recommended disposition of the defendants' motions to suppress, Judge Randa may decide the record regarding the scratches on the screw requires further development. However, due to the fact the defendants, whose appearance would be requisite at a supplemental evidentiary hearing, pursuant to Fed. R. Crim. P. 43(a), are confined in California, necessitating two (2) to three (3) weeks advance notice of an evidentiary hearing in this District so they could be transported here by the United States Marshal, it is impossible for me to conduct such a hearing by reason of my March 31, 1994 retirement from the bench.

In sum, this Court finds testimony of Officer Luedke regarding the loose panel is credible, but that testimony combined with the other factors which contributed to reasonable suspicion to stop the defendants, did not establish probable cause to search the door panel.[1] The record regarding the scratches on the screw is inconclusive and does not contribute to this Court's probable cause calculus. Consequently, this Court will recommend that the defendants' motions to suppress physical evidence be granted.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **GRANTING** defendant Saul Ornelas' motion to suppress and exclude physical evidence; and,

IT IS FURTHER RECOMMENDED that the United States District Judge enter an order **GRANTING** that aspect of defendant Ismael Ornelas-Ledesma's motion to suppress items seized from the 1981 Oldsmobile.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule 13.03 (E.D. Wis.), whereby written objections to the foregoing recommendation may be filed in duplicate with the Clerk

of Court within ten (10) days hereof. Failure to file a timely objection shall result in a waiver to your right to appeal.

Dated at Milwaukee, Wisconsin this 29th day of March, 1994.

Robert L. Bittner

ROBERT L. BITTNER
United States Magistrate Judge

AO 72A

1. In its February 12, 1993 recommendation, this Court also found there was not probable cause for a search of the door panel. However, it recommended the defendant's motions to suppress be denied, based upon its finding that discovery of the cocaine in the door panel fell within the inevitable discovery exception to the exclusionary rule. This finding was not defended on appeal by the government and, consequently, has been waived. United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405, slip op. at 15.

Copy mailed to attorneys for parties by the Court pursuant to Rule 49 (c) Federal Rules of Criminal Procedure.

FILED
U.S. DISTRICT COURT EAST. DIST. WISC.
FEB - 9 1993
AT ____ O'CLOCK ____ M
SOFRON B. NEDILSKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

-vs-

Case No. 92-CR-243

SAUL ORNELAS and
ISMEAL LEDESMA ORNELAS,

Defendants.

ORDER

This matter comes before the Court on a joint appeal filed by the defendants, Saul Ornelas and Ismeal Ledesma Ornelas ("Defendants"), to an Order issued by Magistrate Judge Robert L. Bittner denying Defendants' Motions to Compel Discovery seeking printout copies of computer information received by a Milwaukee County Sheriff's detective through the NADDIS System and through a system that can track the owner of a vehicle by reference to the vehicle's license plate. Magistrate Judge Bittner's Order was issued on January 15, 1993, and the joint appeal was filed on January 20, 1993. The Defendants also requested that the evidentiary hearing regarding the validity of the Terry stop and investigation, scheduled for 10:00 a.m. on January 21, 1993, be stayed in the event the Court was unable to review the appeal prior to the hearing.

The Court was able to fully review the Defendants' joint appeal prior to the Terry hearing, and verbally communicated to Magistrate Judge Bittner's Chambers prior to the hearing the Court's decision to affirm his decision and deny the appeal. This Order merely memorializes that decision. Therefore, pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 13.02, the Court hereby finds that Magistrate Judge Bittner's Order denying the motions to compel was not clearly erroneous or contrary to law, and further adopts and incorporates here by reference the reasoning contained in that Order as the basis for the Court's decision to deny Defendants' joint appeal.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendants' Motion to Stay Evidentiary Hearing is denied; and

2. Defendants' joint appeal of Magistrate Judge Bittner's January 15, 1993 Pretrial Order denying Defendants' Motions to Compel Discovery is denied.

Dated at Milwaukee, Wisconsin, this 9th day of February, 1993.

SO ORDERED,

HON. RUDOLPH T. RANDA
U. S. District Judge

Copy mailed to attorneys for parties by the Court pursuant to Rule 49 (c) Federal Rules of Criminal Procedure.

FILED
U.S. DISTRICT COURT EAST. DIST. WISC
MAR - 9 1993
AT ____ O'CLOCK ____ M.
SOFRON B. NEDILSKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

-vs- **Case No. 92-CR-243**

ISMEAL ORNELAS LEDESMA and SAUL ORNELAS,

Defendants.

DECISION AND ORDER

This matter comes before the Court on objections filed by the defendants, Ismeal Ornelas Ledesma ("Ismeal") and Saul Ornelas ("Saul"), to the Recommendations issued by Magistrate Judge Robert L. Bittner denying defendants' motions to suppress certain statements and physical evidence. For the following reasons, defendants' objections are overruled and the Magistrate's Recommendation is affirmed, although the Recommendation as to the suppression of physical evidence is affirmed on grounds somewhat different than those expressed by Magistrate Bittner.

Magistrate Bittner's Recommendation thoroughly explains the nature of the case and his corresponding findings of fact, which the Court incorporates here by this reference. In the interests of brevity, and having read the parties'

initial briefs before the Magistrate and subsequent written objections, the Court summarily affirms the Magistrate's recommendations regarding (1) the finding of reasonable suspicion for a *Terry*-stop; (2) the finding of consent for the vehicle search; and (3) the denial of both defendants' motions to suppress their post-arrest statements. With respect to the foregoing issues the Court simply adopts the reasoning contained in Magistrate Bittner's Recommendation, along with the factual findings he relied upon in reaching those conclusions.[1] Thus, the only question remaining is whether the cocaine seized from the defendants' vehicle must be suppressed as the result of an invalid search.

I. SUPPRESSION OF PHYSICAL EVIDENCE.

Magistrate Bittner found that removing the door panel to find the cocaine at issue was a search that went outside the scope of the defendants' initial consent to search the vehicle, and further that the search could not be justified on grounds of probable cause. (Magistrate Recommendation at 15.) The

[1] With one exception (the question whether Officer Luedke's gun was visible as he approached the defendants' vehicle -- the parties agree that it was not), none of the parties attack the basic accuracy of the facts as found by Magistrate Bittner, although both defendants dispute the legal conclusions reached by the Magistrate based on those facts. For example, defendant Ismeal points to several facts which he feels are important to the issues but which the Magistrate did not address, and also disputes the Magistrate's characterizations of some of the underlying testimony and evidence. (Ismeal's Objection at 2-10.) Defendant Saul does the same, particularly with respect to the decision on the motion to suppress his post-arrest statements (Saul Objection at 4-5), and then simply incorporates the arguments and facts contained in his initial briefing, which are essentially the same facts and characterizations of testimony stressed by Ismeal in his objection. (Saul Objection at 2.) The Court has taken into consideration the additional facts and differing characterizations raised by the defendants in these documents and finds that, even if true, they do not affect the Court's decision to affirm Magistrate Bittner's Recommendation on the three issues referenced above. The Court therefore adopts the Magistrate's factual findings as its own, with the exception of his finding that Officer Luedke's gun was "visible but not drawn" as he approached the defendants' vehicle. (Magistrate Recommendation at 5-6.) The Court, having read the objections of record and the transcript of Officer Luedke's testimony, hereby finds that Officer Luedke's gun was not visible as he approached the defendants' vehicle.

Magistrate nonetheless denied the motions to suppress on grounds of inevitable discovery, finding that the police had a sniffer dog present at the scene which would have been used by the officers to find the cocaine if their own search proved unsuccessful. (Id. at 16.) The Court does not reject the Magistrate's holding regarding inevitable discovery[2], but finds that holding unnecessary in view of the Court's belief that the facts found by Magistrate Bittner establish probable cause to remove the door panel at issue and search the compartment behind it.

The United States Supreme Court has cautioned lower courts not to become too technical or mechanical in their probable cause determinations:

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief". . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. . . . "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about

[2] Under the doctrine of inevitable discovery, evidence obtained by unlawful means will not be excluded if the prosecution can establish, by a preponderance of the evidence, that the same information inevitably would have been discovered by alternate lawful means which the police were actively pursuing prior to the misconduct. See generally, Nix v. Williams, 467 U.S. 431 (1984). Here, the Magistrate found, and this Court concurs, that the officers had summoned a sniffer dog and dog handler to the scene prior to the search, and that the officers would have used the dog if the search had not proved successful. (Magistrate Recommendation at 16-17.) The Magistrate also found that a canine sniff would have found the cocaine at issue. (Id.) The defendants now object to this latter finding, arguing that there was no evidence submitted during the suppression hearing regarding the reliability of canine sniffs in general, or of sniffs by this dog in particular. (Saul's Objection at 2-3; Ismeal's Objection at 15-16.) The Magistrate apparently did not consider this question, perhaps because neither defendant raised the issue in their post-hearing briefs, or perhaps because both defendants' briefs seemed to admit the same by stating that "[d]ogs have been trained to sniff the exterior of cars and do react or alert to cocaine hidden in car bodies and in trunks." (See Saul's Brief at 19; Ismeal's Brief at 25-26.)

> human behavior; jurors as factfinders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

Texas v. Brown, 460 U.S. 730, 742 (1983). (Citations omitted.)

The Seventh Circuit requires the same flexibility. "Probable cause exists if the facts and circumstances within [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an item subject to seizure will be found in the place to be searched." United States v. Garza-Hernandez, 623 F.2d 496, 499 (7th Cir. 1980). "Probable cause is thus more than bare suspicion, but less than virtual certainty." Id. "As the term itself implies, probable cause exists if the probability is that the thing sought is in the place to be searched; probabilities are to be assessed in the light of practical experience and the practical inferences to be drawn from known or reliable facts." Id. "Government agents are entitled to reasonably rely on their special knowledge and expertise in assessing probabilities and drawing inferences." Id.

In cases involving a vehicle search, "[p]robable cause . . . exists when the facts and circumstances would lead a reasonably prudent person to believe that the vehicle contains contraband." United States v. Strickland, 902 F.2d 937, 942 (11th Cir. 1990). "The facts and circumstances upon which a finding of probable cause is based include "the sum total . . . and the synthesis of what the police have heard, what they know, and what they observe as trained officers." Id., at 942-43. Moreover, in cases involving a *Terry*-stop based upon reasonable

suspicion, information gathered after the stop may be added to information gathered before the stop for purposes of determining whether there is probable cause, and as such the reasonable suspicion relied upon in making the stop may ripen into probable cause to search. See generally, United States v. Van Lewis, 409 F. Supp. 535, 542 (E.D. Mich. 1976); United States v. Avalos-Ochoa, 557 F.2d 1299, 1303 (9th Cir. 1977).

The Magistrate's decision on the probable cause issue focused upon the accuracy of one fact, i.e., whether Officer Luedke was correct in his belief that a screw attaching the air vent to the door panel was rusted, giving rise to his belief that the panel had been recently removed. After the screw was produced and the parties stipulated to the fact that it was not rusted, the Magistrate ruled that there was no probable cause to search because "[t]he record disclose[d] no evidence from which Luedke could conclude that a hidden panel contained contraband." (Magistrate Recommendation at 15.)

The Magistrate's ruling would appear to run contrary to his own factual findings, and in any event does not consider the totality of the circumstances leading up to the removal and search of the door panel. The defendants and their car were singled out during a routine survey of motels conducted for the express purpose of looking for drug trafficking activity. (Magistrate Recommendation at 3.) The vehicle involved was a 1981 two (2) door Oldsmobile, an older GM model which is often used by drug traffickers to conceal contraband. (Id.) The car had California license plates, and its owner was listed as residing in California, a source state for controlled substances. (Id.) There were two individuals travelling together in the car, and they had checked into the motel

at four o'clock in the morning, without reservations. (Id.) By itself this "drug courier profile", as the defendants call it, may not constitute reasonable suspicion or probable cause. But then two NADDIS checks were run on the names of the car owner and the individual listed in the motel's registry, and both names turned up hits on known drug dealers.[3] (Id. at 4.) These hits, combined with the drug courier profile, clearly gave rise to a reasonable suspicion that drug trafficking activity was afoot and that the vehicle contained contraband of some kind. This reasonable suspicion became probable cause when Officer Luedke found that the right rear door panel of the car was loose, leading him to suspect that the panel had been removed and that contraband was hidden inside. (Id. at 6-7; Transcript of Off. Luedke's Testimony at 15-16.)

Thus, considering the totality of the circumstances, including the drug courier profile, the two NADDIS hits, and the loose door panel, this Court finds that an officer of reasonable caution would be justified in the belief that

[3] Much has been made of the fact that there appeared to be some minor discrepancies between the names and addresses of the individuals who turned up on the NADDIS check, and the names which the officers had actually obtained during their investigation. For instance, the name on the motel registry was "Ismeal Ornelas", and Ismeal's drivers license, which he produced prior to the search, indicated that he lived in California. The NADDIS hit, however, was for an individual named "Ismeal Ornelas, Jr.", who was listed as being a resident of Arizona. Similarly, defendants allege that the proper Hispanic translation of the name given to the officer as the owner of the vehicle was Miguel Ornelas-Ledesma, whose residence was listed as San Jose, California. The NADDIS hit was for a Miguel Ledesma-Ornelas, whose residence was listed as El Centro, California. Focusing on these discrepancies as a basis for defeating probable cause introduces requirements of certainty and absolute correctness into the analysis that were expressly proscribed by the Supreme Court in Texas v. Brown. It also ignores the fact that drug traffickers may be highly mobile, that the names at issue are virtually identical, that the names are associated with individuals fitting a drug courier profile, and that the names are further associated with a vehicle containing a loose door panel.

contraband would be found behind the right rear door panel.[4] This conclusion is further supported by decisions from the Seventh Circuit finding that the amount of probable cause necessary for the police to do something, such as conduct a search, "depends on how deeply they invade the zone of privacy", United States v. Concepcion, 942 F.2d 1170, 1173 (7th Cir. 1991), and that "the reasonable expectation of privacy that persons may have in their autos is usually of a lesser magnitude than privacy expectations that inhere in other types of property." Garza-Hernandez, 623 F.2d at 500. Given this lower expectation of privacy, and the confluence of the above facts and circumstances, the officers clearly had probable cause to remove the door panel.[5]

[4] The fact that the screw holding the air vent to the door panel was not rusted, as Officer Luedke had testified, does not destroy probable cause. According to his own testimony, Luedke already had reason to believe the panel had been removed, and contraband hidden inside, by virtue of the fact that the panel was loose. (Luedke Transcript at 15-16; Magistrate Recommendation at 6-7.)

[5] Of course, the above analysis only resolves the probable cause issue, which is only half of the analysis under the Fourth Amendment. Even with probable cause, officers must first obtain a warrant to search, unless the circumstances fall within one of the exceptions to the warrant requirement. Here, the exception is obvious, i.e., the "automobile exception". The "automobile exception" allows the warrantless search of a vehicle where probable cause exists to believe that the vehicle contains contraband or evidence of criminal activity. United States v. McGuire, 957 F.2d 310, 314 (7th Cir. 1992). The exception is justified by the vehicle's ready mobility and the lesser expectation of privacy people have in their automobiles. United States v. Galiman, 907 F.2d 639, 641 (7th Cir. 1990).

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The defendants' objections to the Magistrate's Recommendation are overruled, and the defendants' motions to suppress certain post-arrest statements and physical evidence are denied; and

2. No objection being taken to the Magistrate's Order granting Defendant Saul Ornelas' motion for severance[6], the same is affirmed.

Dated at Milwaukee, Wisconsin, this 9th day of March, 1993.

SO ORDERED,

HON. RUDOLPH T. RANDA
U. S. District Judge

[6] As Defendant Saul Ornelas correctly points out, the Magistrate's Order contains a typographical error on the last page, which states that the defendant's motion for severance was "denied" rather than "granted". The analysis contained on the page preceding the typo makes it clear that Magistrate Bittner was granting the motion, not denying it, and that the statement on the following page was in error.

AO 72A
(Rev. 8/82)

Copy mailed for ... at ... of Criminal Procedure.

4:20 P.M.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JAN 15 1993

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAUL ORNELAS and
ISMEAL LEDESMA ORNELAS,

Defendants.

Case No. 92-Cr-243

MEMORANDUM AND ORDER RE: DEFENDANTS' MOTIONS TO COMPEL DISCOVERY

MEMORANDUM

Defendants Saul Ornelas and Ismeal Ledesma Ornelas move the Court for issuance of orders compelling the government to disclose printout copies of information received by Milwaukee County Sheriff's Department Detective Michael Pautz on December 11, 1992 through the Narcotics and Dangerous Information Systems (hereinafter referred to as NADDIS) concerning Miguel Ledesma Ornelas, as well as information he received regarding the owner of a 1981 Oldsmobile bearing State of California license plate #CA 2YOY835 which Detective Pautz had stopped. Defendant Saul Ornelas also seeks disclosure of the "raw data" used to create the NADDIS entry. In response the government has indicated that neither NADDIS nor the motor vehicle license plate information were ever printed out from the computer and has proffered affidavits in support of this response. Since the materials which the defendants seek do not exist, they obviously cannot be disclosed. Thus, the defendant's request for printouts will be denied.

AO 72A
(Rev. 8/82)

Furthermore, as to defendant Saul Ornelas' request for the government files used to create the NADDIS information on Miguel Ledesma Ornelas, he has failed to establish it is exculpatory information to which he is entitled under Brady v. Maryland, 373 U.S. 83 (1963) or that it is discoverable under Fed. R. Crim. P. 16. Accordingly, the motions to compel discovery of defendants Saul Ornelas and Ismeal Ledesma Ornelas will be denied.

ORDER

NOW THEREFORE, IT IS ORDERED that defendant Saul Ornelas' motion to compel discovery be and hereby is **DENIED**; and,

IT IS FURTHER ORDERED that defendant Ismeal Ledesma Ornelas' motion to compel discovery be and hereby is **DENIED**.

Your attention is directed to 28 U.S.C. § 636(b)(1)(A) and Local Rule 13.02 (E.D. Wis.), whereby written appeal from any order herein or part thereof may be filed within ten (10) days hereof.

Dated at Milwaukee, Wisconsin this 15th day of January, 1993.

BY THE COURT:

Robert L. Bittner

ROBERT L. BITTNER
United States Magistrate Judge

Copy entered as statement for record of court pursuant to Rule 32(c) Federal Rules of Criminal Procedure.

5:00 FILED P.M.
CLERK U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

FEB 12 1993

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAUL ORNELAS and
ISMEAL LEDESMA ORNELAS,

Defendants.

Case No. 92-Cr-243

MAGISTRATE JUDGE'S RECOMMENDATION TO THE HONORABLE RUDOLPH T. RANDA AND ORDER

NATURE OF THE CASE

On December 15, 1992 a federal grand jury sitting in this District returned a one (1) count indictment against defendants Saul Ornelas (hereinafter referred to as Saul) and Ismeal Ledesma Ornelas (hereinafter referred to as Ismeal), charging them with violating 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 by knowingly and intentionally possessing, with intent to distribute, a mixture containing cocaine.

The defendants appeared before this Court on December 17, 1992 for arraignment, entering pleas of not guilty. Pursuant to the pretrial scheduling order, the defendants filed various pretrial motions which are ready for resolution and will be addressed herein. Previously, the defendants' motions to compel discovery were denied by this Court's order of January 15, 1993, which was upheld on appeal by Judge Randa.

MOTIONS TO SUPPRESS

Defendants Saul and Ismeal move the Court for issuance of orders suppressing evidence seized on December 11, 1992 from their persons and a 1981 Oldsmobile bearing State of California license plate number 2YOY835, which was parked in front of room 4 of the Suburban Motel, 4600 South 27th Street, Milwaukee, Wisconsin. They contend their Fourth Amendment rights to be free from unreasonable searches and seizures were violated when law enforcement officers subjected them to an investigatory stop, without "reasonable suspicion"; searched the Oldsmobile without their consent and, without probable cause, conducted an intrusive search of the interior of the vehicle's right rear door by removing a plastic vent cover. Both defendants also seek suppression of statements obtained from them while they were in custody at the City of Milwaukee Police Department (hereinafter referred to as MPD) on the grounds such statements were obtained in violation of their Miranda rights and were involuntary.

These motions were the subject of an evidentiary hearing conducted by the Court on January 21, 22, and 25, 1993. At the hearing Milwaukee County Deputy Sheriffs (hereinafter referred to as MCDS) Michael Pautz, Lyle Luedke, Gil Pagan, Donald Hurrle, Roger R. Wiggins, and United States Department of Justice, Drug Enforcement Administration (hereinafter referred to as DEA) Special Agent (hereinafter referred to as SA) James Allen appeared and testified on behalf of the government. A supplemental evidentiary hearing was convened on January 28, 1993 to admit into evidence a Phillips screw which had been removed from the plastic vent cover of the right rear

AO 72A
(Rev. 8/82)

door of the Oldsmobile, and to place upon the record the parties' stipulation that no rust appeared on the screw. Based on the testimony and evidence adduced at such hearings, as well as having considered the briefs and arguments of the parties, this Court makes its findings of fact and proposed dispositions of such motions.

Findings of Fact

On Friday, December 11, 1992 MCSD plain clothes Detective Michael Pautz, a twenty (20) year veteran who has been assigned to the Drug Enforcement Unit for two (2) years, was engaged in a routine survey of motels located along South 27th Street, Milwaukee, Wisconsin looking for drug trafficking activity. At the Suburban Motel, 4600 South 27th Street, Milwaukee, Wisconsin, he observed a 1981 two (2) door Oldsmobile automobile with California license plates 2YOY835 parked in front of room 4. Based upon his experience and training in drug interdiction, Pautz knew an older two (2) door GM vehicle is often used to transport drugs and California is a source state for controlled substances; consequently, he contacted his dispatcher to check on the license plate. The dispatcher advised Pautz the vehicle was listed to one Miguel Ornealas of 830 North 16th Street, San Jose, California with an additional name of "Ledesma." However, Pautz was not sure whether the dispatcher indicated the name "Ledesma" came before or after the name "Ornealas." After speaking with the dispatcher, Pautz spoke with the motel clerk who disclosed, at 4:00 a.m. that morning, an individual named Ismeal Ornelas had checked into

AO 72A
(Rev. 8/82)

room 4 with another individual, without prior reservations, and was due to check out at 11:00 a.m.

Pautz then requested his partner, MCDS plain clothes Detective Donald Hurrle, meet him at the motel. Upon Hurrle's arrival in an unmarked car approximately fifteen (15) to twenty (20) minutes later, Pautz briefed him about the Oldsmobile and the occupants of room 4. Pursuant to Hurrle's suggestion, Pautz contacted the Milwaukee DEA office and asked for a Narcotics and Dangerous Drugs and Information Systems (hereinafter referred to as NADDIS) check on the names Ismeal Ornelas and Miguel Ledesma Ornealas. A short time later, Pautz was advised both names appeared on NADDIS and was given the following information: Miguel Ledesma Ornealas, a/k/a Miguel Ledesma-Lemus, with a date of birth September 29, 1945, 5'6", 150 pounds, Hispanic male was a heroin dealer from El Centro, California; Ismeal Ornelas, Jr., from Tuscon, Arizona was a 1,000 kilogram a month cocaine dealer. Pautz is not familiar with the geography of California and did not know that San Jose and El Centro, California are 600 miles apart. Upon receiving the NADDIS information, Pautz and Hurrle decided to conduct surveillance of room 4 of the Suburban Motel and to summon to the scene MCDS Detective Lyle Luedke, the narcotics dog handler for the Drug Enforcement Unit, because they suspected the Oldsmobile contained drugs.

Shortly after 9:30 a.m. Luedke, in plain clothes, arrived in an unmarked car at the scene, together with the narcotics detection dog. In the K-Mart parking lot across the street from the Suburban Motel, Detective Hurrle advised Luedke they were conducting

surveillance of room 4 of the Suburban Motel which they believed was occupied by a possible drug courier, Ismeal Ornelas, and another individual, whose identity was unknown. He was further advised check-out time for room 4 was 11:00 a.m. and, if time permitted, the exterior of the Oldsmobile should be "sniffed" by the drug detection dog.

Not long after Luedke arrived, Pautz departed the scene; Hurrle and Luedke repositioned themselves on the same side of the street as the Suburban Motel, because heavy traffic had obscured their view from the parking lot, and continued to conduct surveillance of room 4 from their separate cars which were parked approximately 250 yards away. After approximately forty-five (45) minutes, Hurrle observed an individual, later identified as Saul, open the hood of the Oldsmobile, tinker briefly under the hood, and start the ignition. He then returned to the room to pick up luggage and loaded it into the trunk. The other individual, later identified as Ismeal, exited room 4 and assumed a position in the front passenger seat of the Oldsmobile while Saul went briefly into the motel office. Shortly thereafter, Saul returned to the vehicle and positioned himself in the driver's seat.

At this point, the officers drove their separate unmarked vehicles to parking spaces on either sides of the Oldsmobile. However, the position of their cars did not box in the Oldsmobile and prevent it from leaving the scene. Both officers were dressed in plain clothes. Hurrle, who had no visible gun, proceeded to the driver's side of the vehicle and Luedke, who had a gun visible but not

drawn, proceeded to the passenger side. Hurrle identified himself as a law enforcement officer, asked the occupants of the vehicle whether he could speak to them, and inquired whether they were in possession of any illegal drugs or contraband. Both occupants responded, almost simultaneously, they had nothing illegal or anything like that. In response to a request for identification, both Saul and Ismeal produced identifying documents. Luedke reviewed the California driver's license produced by Ismeal, listing Ismeal's residence as Martinez, California. Ismeal responded in the affirmative to Luedke's inquiry whether he had just arrived from California. Luedke did not realize there was a discrepancy between the NADDIS report listing Ismeal Ornelas as being from Tucson, Arizona and the fact the Ismeal before him was apparently from California. The identification documents produced by Saul and Ismeal were retained by the law enforcement officers. At Hurrle's request Saul, the driver, consented to have the officers look inside the vehicle. In fact, Saul opened the trunk of the Oldsmobile with a key and held the trunk lid up to allow Hurrle to search it and the luggage inside. While the trunk was being searched, Saul was very calm and Ismeal was also calm, but shaking.

When Hurrle announced he had completed the search of the trunk, with negative results, Luedke proceeded to the passenger area of the vehicle and checked to see whether the back seat was loose. Upon finding it was not, he examined the right rear quarter panel near the handle. He found this panel to be loose. Based upon his training, Luedke suspected the panel had been removed and contraband

AO 72A
(Rev. 8/82)

was hidden inside. Luedke testified he then observed the vent area of the door, noticing the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led him to believe the vent cover had recently been removed. Luedke then released the screw, dismantled the vent area of the door, and exposed a cavity approximately five (5) inches high and four (4) inches wide which contained a paper bag in which he felt a hard block. After unsuccessfully attempting to remove the bag through the vent opening, Luedke removed the interior panel of the right rear door, retrieved the paper bag, and told Hurrle he had "found something." Luedke tore open the bag, revealing a block of cocaine wrapped in aluminum foil and tape.

At that point, the defendants were handcuffed, placed under arrest, and placed in separate cars. Sometime after the cocaine was found, Luedke had his dog sniff the Oldsmobile, but no other cocaine was detected. At the scene, Hurrle advised Ismeal of his Miranda rights after he was placed in Hurrle's car, although he was not questioned until approximately two (2) hours later at the MPD.

Upon arrival at the MPD, Ismeal was taken to an interrogation room approximately eight (8) by ten (10) feet in size, where he remained in leg irons for approximately an hour. At 1:08 p.m., Pautz again advised Ismeal of his Miranda rights and Pautz and Hurrle began to interview Ismeal. Shortly after the commencement of the interview, which was taped, Hurrle stated to Ismeal:

> I want to tell you if you cooperate with us we can make you one promise and one promise only . . . we will speak on your behalf to the Assistant District Attorney or the U. S. Attorney

AO 72A
(Rev. 8/82)

> or to the Court if necessary and advise them that you cooperated with us, o'k. We cannot at this point tell you that you are not going to jail. We can't tell that you're going to get a lesser sentence because you cooperated with us. All we can tell you is one thing. We will speak on your behalf. We will tell them that you cooperated with us. That could mean a whole lot and more than likely will mean a lot to those people.

Sometime later in the interview, Hurrle told Ismeal "We'll tell the DA or the United States Attorney that you told us something and we found out later that it was a flat out lie and then you don't get in any deals more than likely." During the course of the interview, Ismeal stated he understood his Miranda rights, never asked for an attorney, he did not appear to be under the influence of alcohol or drugs, he was cooperative and experienced no difficulty communicating with the officers in English. The interview ended at 1:45 p.m.

At approximately 1:30 p.m. MCDS Gil Pagan, a 4-1/2 year veteran assigned to the Drug Enforcement Unit since September 1991 whose native language is Spanish and has been interpreting in an unofficial capacity for thirty-two years and in an official capacity since August 8, 1988, albeit without any formal training in interpretation, advised Saul of his Miranda rights using a standard English advice of rights card which he translated into Spanish. After Pagan interpreted each right from English into Spanish, Saul stated he would be willing to cooperate.

About 2:00 p.m. Hurrle and Pautz entered the fourteen (14) by ten (10) conference room where Saul and Pagan had been waiting and the interview of Saul commenced. Pagan acted as interpreter throughout most of the interview; however, there were times during the

course of the interview where Saul understood questions posed to him by Hurrle and responded in English without the assistance of Pagan. Saul was advised that the only thing law enforcement officers would do for him, if he decided to cooperate, was to inform the D.A. or the Court of his cooperation, but that they did not guarantee him anything. During the course of the interview, Saul was coherent and fairly calm, although he seemed concerned about his situation. During the course of the interview, the deputies engaged in banter among themselves which was not translated into English by Pagan. Pautz asked, "Do they have courts in Mexico or do they have standard procedures." Hurrle responded "Due process? A wall?" In return, Pagan added, "Seven muskets in front of you?" The interview of Saul during which he made no incriminating statements lasted approximately thirty (30) minutes.

At approximately 2:45 p.m. Luedke reinterviewed Ismeal because he wanted to know how the cocaine got into the right rear quarter panel of the Oldsmobile - information which neither defendant had disclosed during their interviews. At the commencement of the interview, which was conducted in a five (5) by seven (7) foot room containing a desk, two (2) chairs, and an ashtray, Luedke advised Ismeal of his Miranda rights by reading verbatim from an advice of rights card. Pautz was present during the interview. No threats or promises were made to Ismeal and he was allowed to smoke. His demeanor was very solemn. Throughout the interview, he stated he understood his rights and proceeded to make a statement that Saul had placed the cocaine in the cavity of the right rear quarter panel door.

At the hearing MCDS Sergeant Roger R. Wiggins, a twenty (20) year veteran who has been second-shift supervisor of the Communications Bureau for four (4) years, testified his bureau routinely runs Department of Motor Vehicle computer checks using state license plate numbers to obtain the owner's name, residence, and the make of car to which the license is listed. He stated additional information can be obtained by making an administrative request. On January 19, 1993 Wiggins made a license check and an administrative inquiry on the Oldsmobile. The initial request revealed the vehicle belonged to "Ornelas Miguel Ledesma" of San Jose, California. The administrative request showed the owner of the vehicle to be Miguel Ornelas, also known as "Ledesma Miguel Ornelas"; an updated San Jose, California street address; the owner's sex; date of birth; height; weight; hair color; and eye color.

Officer Pagan reviewed the administrative request and stated the alternative name listed for Miguel Ornelas was for a person named "Miguel Ornelas-Ledesma." He further testified the majority of Hispanics use their father's name first and then their mother's name.

Analysis

Although the government initially disputed the defendants' expectation of privacy in the Oldsmobile, during the course of the evidentiary hearing, it conceded both defendants had the requisite expectation of privacy to allow them to assert that their Fourth Amendment rights had been violated by the search of the vehicle. Consequently, the threshold issue in this case is whether the

defendants were subjected to a seizure by law enforcement officers. The law is well established that an encounter between a law enforcement officer and a citizen implicates the Fourth Amendment only if the officer seizes the citizen. United States v. Mendenhall, 446 U.S. 544, 555 (1980); Terry v. Ohio, 392 U.S. 1, 19 (1968). If a seizure does not occur; and therefore, the encounter is consensual in nature (limited to questioning about an individual's identity and requesting identification), then police do not need justification for this contact. INS v. Delgado, 466 U.S. 210, 216-17 (1984); United States v. Dyer, 784 F.2d 812, 815-16 (7th Cir. 1976); United States v. Borys, 766 F.2d 304, 310-11 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986). The test for determining whether a police-citizen contact rises to the level of a Fourth Amendment seizure is an objective one. United States v. Espinosa-Alvarez, 839 F.2d 1201, 1205 (7th Cir. 1988); United States v. Pavelski, 789 F.2d 485 (7th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 322 (1986). This formulation is whether, based on the totality of circumstances, a reasonable person would believe his freedom of movement is restrained or believes he is at liberty to disregard a police officer's request for information. If the latter, then a seizure has not occurred. United States v. Espinosa-Alvarez, 839 F.2d at 1205.

In order to assess the reasonableness of the seizure, this Court must weigh the circumstances on the Fourth Amendment "scale" for police/citizen encounters. See United States v. Chaidez, 919 F.2d 1193, 1197 (7th Cir. 1990). "[A] person has been 'seized' within the meaning of the Fourth Amendment . . . . only if, in view of all of the

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (citations omitted). Recently the Court of Appeals for this Circuit summarized the three (3) categories for police/citizen encounters in relation to the Fourth Amendment as follows:

> The first category is an arrest, for which the Fourth Amendment requires that police have probable cause to believe a person has committed or is committing a crime. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The second category is an investigatory stop, which is limited to a brief, non-intrusive detention. This is also a Fourth Amendment "seizure", but the officer need only have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. United States v. Brignoni-Ponce, 422 U.S. 873, 881-82, 95 S.Ct. 2574, 2580-81, 45 L.Ed.2d 607 (1975); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The third category involves no restraint on the citizen's liberty, and is characterized by an officer seeking the citizen's voluntary cooperation through non-coercive questioning. This is not a seizure within the meaning of the Fourth Amendment. United States v. Mendenhall, 446 U.S. 544, 553-55, 100 S.Ct. 1870, 1876-77, 64 L.Ed.2d 497 (1980); Terry, 392 U.S. at 19, n.16, 88 S.Ct. at 1879, n.16.

United States v. Johnson, 910 F.2d 1506, 1508 (7th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 764 (1991). See also, United States v. Adebayo, No. 91-2138, slip op. at 8 (7th Cir. Feb. 5, 1993).

"So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." United States v. Williams, 945 F.2d 192, 195 (7th Cir. 1991). "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Withers, 972 F.2d 837, 841 (7th Cir. 1992) (citations omitted).

The distinction between a consensual encounter and a stop is one of degree. Relevant factors include whether the encounter occurred in a public or private place, whether the suspect consented or refused to talk to the police, whether the police informed the suspect that he was not under arrest and was free to leave, whether the police removed the suspect to another area, whether the suspect felt capable of refusing to consent to the search, and whether the suspect eventually departs the area without hinderance. See United States v. Withers, 972 F.2d at 842. Other factors in this determination include: "The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or the tone of voice indicating that compliance with the officer's request might be compelled." United States v. Withers, 972 F.2d at 842 (quoting United States v. Mendenhall, 446 U.S. 544, 554-55 [1980]). Additionally, the "lengthy" retention of documents, such as identification and airline tickets, is a factor in determining whether a stop has occurred. See United States v. Withers, 972 F.2d at 842.

Here, the encounter between the law enforcement officers and the occupants of the 1981 Oldsmobile was initially a Terry stop. Within moments of the encounter, Hurrle was in possession of their identification documents, questioning them as to whether they had drugs in the car, and requesting permission to search the vehicle.

The defendants were never told they were not under arrest or that they were free to leave. At the time they approached the defendants, the law enforcement officers had knowledge of "specific and articulable facts which, when taken together with the rational inferences from those facts", could reasonably cause them to conclude, in light of their experiences, that criminal activity was afoot. Terry v. Ohio, 392 U.S. 1, 21 & 30 (1968). Pautz specifically testified it had been his experience that vehicles similar to the Oldsmobile are used to transport narcotics. In addition, Pautz learned the registered owner of the vehicle was from a source state, the owner's name came back on NADDIS as being a drug trafficker, and the name of Ismeal Ornelas, Jr. came back on NADDIS as also being a drug trafficker. An additional factor contributing to the reasonable suspicion of drug trafficking was the defendants' 4:00 a.m. check-in to the motel. Consequently, this Court concludes the defendants were subjected to an investigatory detention, based on reasonable suspicion, and the seven (7) to ten (10) minute detention until the cocaine was discovered was reasonable. See Piska v. City of Stevens Point, Wis., 823 F.2d 1168, 1176 (7th Cir. 1987) (ten [10] minute stop reasonable); United States v. Davies, 768 F.2d 893, 902 (7th Cir.), cert. denied, 474 U.S. 1008 (1985) (forty-five [45] minute stop reasonable); United States v. Kapperman, 764 F.2d 786, 792 (11th Cir. 1985) (ten [10] minute stop reasonable).

The next question to be addressed is whether the Fourth Amendment was violated by the law enforcement officers' search of the Oldsmobile. The Fourth Amendment permits law enforcement officers to conduct a warrantless search, without probable cause, if an authorized

individual voluntarily consents to the search. Florida v. Jimeno, ___ U.S. ___, 111 S.Ct. 1801, 1803 (1991); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). The burden is upon the government to demonstrate, by a preponderance of the evidence under the totality of the circumstances, that consent is freely and voluntarily given. Schneckloth v. Bustamonte, 412 U.S. at 222-27.

The record before the Court clearly establishes consent to search the Oldsmobile. Saul indicated the law enforcement officers could search the vehicle and neither defendant placed any restrictions on the areas the officers could search or, in the course of the search, asked them to stop. However, under United States v. Garcia, 897 F.2d 1413, 1419-20 (7th Cir. 1990), police may not dismantle parts of a car body to search for hidden compartments when they have merely obtained permission to "look in the car" for illegal drugs. Unless the police have probable cause to believe the car contains drugs concealed in hidden compartments, the opening of door panels is "inherently invasive and extends beyond consent given." United States v. Garcia, 897 F.2d at 1420. Here, Luedke's clear testimony was that rust within the groove of the head of the Phillips screw holding the plastic vent cover in place caused him to believe it had been removed and drugs were concealed within the door panel. But, the screw itself belies this testimony. The record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband. Consequently, the Court finds there was not probable cause to dismantle the panel.

Even though the search was beyond the scope of the consent and was not justified by independent probable cause, the cocaine found will not be suppressed as evidence under the inevitable discovery exception to the Fourth Amendment exclusionary rule of Nix v. Williams, 467 U.S. 431, 433 (1984), which holds if the prosecution can establish by a preponderance of evidence that the evidence ultimately or inevitably would have been discovered by lawful means, even if no violation of any constitutional provision had taken place, then the evidence should be received. The stated rationale for the doctrine is that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position, than they would have been if no police error or misconduct had occurred in those circumstances where evidence would have been discovered independent of a constitutional violation. Nix v. Williams, 467 U.S. at 444. The court further stated that, under this doctrine, the prosecution is not required to prove the absence of bad faith as such a requirement would result in withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Nix v. Williams, 467 U.S. at 445.

This Court finds, by a preponderance of the evidence, that regardless of the government's good or bad faith, the cocaine would have inevitably been discovered any way. This Court bases its conclusion upon the inevitability of a canine sniff of the Oldsmobile which does not compromise any legitimate interest in privacy and,

therefore, is not a Fourth Amendment search. See United States v. Vasquez, 909 F.2d 235, 238 (7th Cir. 1990) (citing cases). Luedke's trained drug detection dog was waiting at the scene in his vehicle. Clearly, the defendants would not be allowed to depart from the Suburban Motel without their vehicle being "sniffed" if cocaine was not otherwise discovered. See United States v. Buchanan, 910 F.2d 1571 (7th Cir. 1990).

The final issue to be addressed is the admissibility of the statements obtained from Saul and Ismeal. The government has indicated it does not intend to introduce into evidence any statements made by Saul as a part of its case in chief. Thus, the sole issue as to Saul is the voluntariness of his statements under Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973), in the event the government intends to introduce his statement for impeachment purposes.

In Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), the United States Supreme Court detailed the factors to be considered when evaluating whether a defendant's "will was overborne" in the giving of statements:

> [T]he Court has assessed the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account include the youth of the accused, his lack of education, or his low intelligence, the lack of any advise to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.

(Citations omitted.) Although Hurrle told Saul he would bring any cooperation on his part to the attention of prosecutors and/or the

Court, there is no prohibition on the buying of information with honest promises of consideration. See United States v. Rutledge, 900 F.2d 1127, 1130 (7th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 203 (1990). The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they are just not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible. See United States v. Rutledge, 900 F.2d at 1130 (7th Cir.); United States v. Harris, 914 F.2d 927, 933 (7th Cir. 1990). There is no evidence the statement obtained from Saul was the result of his will being overborne. Thus, there is no basis for suppression of the statements of Saul.

Nor is there any basis for suppression of the statements obtained from Ismeal. Ismeal was advised of his constitutional rights, pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and made a knowing and intelligent waiver of those rights as required by Moran v. Burbine, 475 U.S. 412 (1986). The record does not disclose that the statements which Ismeal seeks to suppress were obtained by overbearing his will. See Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

In this case, Ismeal made a knowing and intelligent decision to cooperate with law enforcement authorities and to provide them with certain information. Although Ismeal was told that any cooperation on his part would be brought to the attention of prosecutors and/or the Court, there is no evidence this representation overbore his free will. Since Miranda and its progeny are designed to protect criminal defendants from coercive police tactics which would produce

involuntary confessions, they afford no protections to criminal defendants who, of their own volition, decide to make statements and otherwise cooperate with authorities.

In sum, this Court concludes no Fourth Amendment violation occurred when law enforcement officers stopped Saul and Ismeal. Furthermore, although the search of the Oldsmobile exceeded the scope of the consensual search, the cocaine would have been inevitably discovered and, therefore, is not subject to suppression. Finally, Ismeal's statements were not obtained in violation of his constitutional rights and Saul's statement was voluntary. Accordingly, this Court will recommend the defendants' motions to suppress evidence and statements be denied.

SAUL'S MOTION FOR SEVERANCE

Saul moves the Court for issuance of an order, pursuant to Fed. R. Crim. P. 14, severing his trial from that of Ismeal relying upon Bruton v. United States, 391 U.S. 123 (1968) which holds admission of a codefendant's confession at a joint trial where the codefendant does not testify and, therefore, cannot be cross-examined, violates a defendant's Sixth Amendment right to confrontation. In the alternative, Saul seeks dismissal of the indictment.

In response the government indicates it has concluded it is not possible to redact Ismeal's confession to delete reference to Saul in a manner which does not still clearly implicate Saul. Consequently, the government concedes severance of the defendants'

trials is necessary. Accordingly, Saul's motion for severance will be granted.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Saul Ornelas' motion to suppress and exclude physical evidence;

IT IS FURTHER RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Saul Ornelas' motion to suppress statements;

IT IS ALSO RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Ismeal Ledesma Ornelas' motion to suppress seizure of items from the 1981 Oldsmobile and the statements of the defendant; and,

IT IS ORDERED that defendant Saul Ornelas' motion for severance be and hereby is **DENIED.**

Written objections to the foregoing recommendations and orders may be filed in duplicate with the Clerk of Court on or before

AO 72A
(Rev. 8/82)



VC./0170 :078 WI0410000
NLET 14843 93 01/19/93 16:04 01 (MILW RCCD 16:05:31)

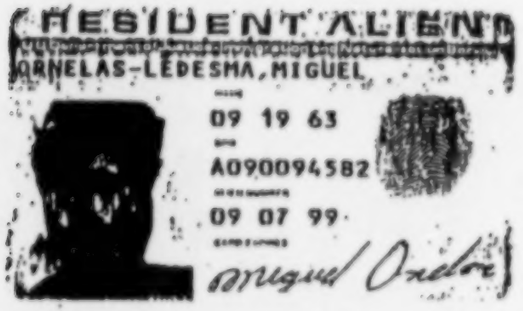
RR.CALICC000
15:03 01/19/93 01206
15:03 01/19/93 00385 WI0410000
*0049853631
TXT
DATE: 01/19/93 TIME: 14:03
REG VALID FROM: 11/10/92 TO 11/10/93
LIC#:2YOY835 YRMD:81 MAKE:OLDS BTM :CP VIN :1G3AM47A5BR478072
R/O :ORNELAS MIGUEL LEDESMA. 830 N 16TH ST CITY:SAN JOSE C.C.:43
ZIP#:95112
RCID:11/04/92 OCID:12/14/88 LOCD:9

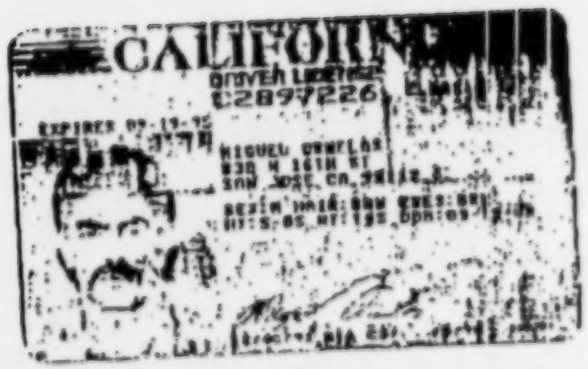
01/13/92 PREV LIC 2GQY212

FND -

UNITED STATES DISTRICT COURT
EASTERN DIST. OF WISCONSIN
Case No. 92-Cr-243
Exh. No. D # E.
Date Rec'd 1/22/93
Deputy Clerk K Zuid

ISMeal Ornelas





UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

UNITED STATES OF AMERICA

vs.

ISMAEL ORNELAS-LEDESMA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 92-CR-243

FILED
U.S. DISTRICT COURT EAST. DIST. WISC.
MAY 21 1993
AT ___ O'CLOCK ___ M
SOFRON B. NEDRLSKY

Brian W. Gleason
Defendant's Attorney

Penelope C. Fleming
Assistant U.S. Attorney

DEFENDANT:

pleaded guilty to count One
was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following nses:

e & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
J.S.C. §§ 841(a)(1)	possession with intent to	December 11, 1992	1
J.S.C. § 2	distribute cocaine		

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The tence is imposed pursuant to the Sentencing Reform Act of 1984.
The defendant has been found not guilty on count(s) _____
and is discharged as to such count(s).
Count _____ is dismissed on the motion of the United States.
It is ordered that the defendant shall pay a special assessment of $ 50.00 for count One, which shall be due [ ] immediately [x] as follows: prior to the expiration of this sentence.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this strict within 30 days of any change of name, residence, or mailing address until all fines, stitution, costs, and special assessments imposed by this judgment are fully paid.

fendant's Soc. Sec. No.: 612-46-6929 & 564-77-1676

fendant's Date of Birth: October 14, 1968

fendant's Mailing Address:

acine County Jail
17 Wisconsin Avenue
acine, WI 53403

fendant's Residence Address:

May 20, 1993
Date of Imposition of Sentence

Signature of Judicial Officer

Hon. Rudolph T. Randa
U.S. District Judge
Name & Title of Judicial Officer

5/21/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons e imprisoned for a term of 60 months.

The court makes the following recommendations to the Bureau of Prisons:

that the defendant serve his sentence at a facility near San Jose, California

The defendant is remanded to the custody of the United States Marshal.
The defendant shall surrender to the United States Marshal for this district.
[ ] at _____ a.m. p.m. on _____
[ ] as notified by the United States Marshal.
The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____, with a certified copy of his judgment.

United States Marshal

By _____
Deputy Marshal

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

UNITED STATES OF AMERICA

vs.

SAUL ORNELAS

AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 92-CR-243

FILED
U.S. DISTRICT COURT EAST. DIST. WISC.
Jun 1 1993
AT ___ O'CLOCK ___ M
BOFRON B. MEDILSKY

Robert G. LeBell
Defendant's Attorney

Penelope C. Fleming
Assistant U.S. Attorney

DEFENDANT:

pleaded guilty to count One
was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following nses:

e & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
.S.C. §§ 841(a)(1) .S.C. § 2	possession with intent to distribute cocaine	December 11, 1992	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The ence is imposed pursuant to the Sentencing Reform Act of 1984.
The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
Count _____ is dismissed on the motion of the United States.
It is ordered that the defendant shall pay a special assessment of $ 50.00 for count One, which shall be due [ ] immediately [x] as follows: as directed by U.S. Probation to Clerk Court.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this rict within 30 days of any change of name, residence, or mailing address until all fines, itution, costs, and special assessments imposed by this judgment are fully paid.

ndant's Soc. Sec. No.: 393-02-2916

ndant's Date of Birth: June 28, 1968

ndant's Mailing Address:

ndant's Residence Address:

24 Begonia Street
caster, California

May 28, 1993
Date of Imposition of Sentence

Signature of Judicial Officer

Hon. Rudolph T. Randa
U.S. District Judge
Name & Title of Judicial Officer

6/1/93
Date

Copy mailed to attorneys for parties by the Court pursuant

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons imprisoned for a term of 63 months.

he court makes the following recommendations to the Bureau of Prisons:

that the defendant serve his sentence at Lompoc, California

he defendant is remanded to the custody of the United States Marshal.
he defendant shall surrender to the United States Marshal for this district.

[ ] at _____ a.m. p.m. on _____
[ ] as notified by the United States Marshal.

he defendant shall surrender for service of sentence at the institution designated by the ureau of Prisons,
[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____, with a certified copy of judgment.

_____
United States Marshal

By _____
Deputy Marshal

idant: Saul Ornelas
Number: 92-CR-243

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

eline Range Determined by the Court:

otal Offense Level: 24

riminal History Category: I

mprisonment Range: 51 to 63 months

upervised Release Range: 4 to 5 years

ine Range: $ 12,500.00 to $ 1,000,000.00

[x] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

estitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following reasons:

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted March 2, 1995

Decided April 18, 1995

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. Richard A. Posner, Chief Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	**Appeal from the United States District Court for the Eastern District of Wisconsin.**
Nos. 94-3349, 94-3350 v.	**No. 92 CR 243**
SAUL ORNELAS, ISMAEL ORNELAS LEDESMA, *Defendants-Appellants.*	**Rudolph T. Randa,** *Judge.*

Order

This is a sequel to the decision of this panel in *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir. 1994), and familiarity with that decision is assumed. Briefly, we held that the district court had erred in denying the defendants' motion to suppress the fruits of a search of their automobile without making a determination of the credibility of Office Luedke's testimony that the panel behind which he found the drugs was loose. We remanded with directions to determine whether the panel was loose; if it was not, to grant the motion; and if it was, to consider whether the loose panel, in conjunction with other suspicious circumstances discussed in our opinion, established probable cause for the search.

On remand, the district judge referred the issue of Luedke's credibility to the magistrate judge before whom Luedke testified and who had recommended that the motion be granted. Without granting a new hearing, the magistrate judge reported that he believed Luedke had testified truthfully about the loose panel. The district judge then determined that when the loose panel was considered in conjunction with the other circumstances, the search was indeed supported by probable cause.

The defendants appeal. Our review is deferential. The district judge's finding of probable cause may be set aside only if clearly erroneous. We do not find clear error. The district judge's opinion, although brief, adequately reviews the circumstances on

which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search. The judgment of the district court must therefore be, and it is,

AFFIRMED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ismael ORNELAS-LEDESMA and Saul Ornelas, Defendants-Appellants.

Nos. 93-2356, 93-2405.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 10, 1993.

Decided Feb. 10, 1994.

Defendants were convicted in the United States District Court for the Eastern District of Wisconsin, Rudolph T. Randa, J., of illegal possession of a controlled substance with intent to distribute, and they appealed. The Court of Appeals, Posner, Chief Judge, held that: (1) police officers had reasonable suspicion of criminal activity necessary for investigatory stop of defendants' vehicle, but (2) remand was required to determine whether police officer had probable cause to remove door panel of vehicle and search for drugs.

Vacated and remanded.

1. Arrest ⇐63.5(6)

Narcotic and Dangerous Drug Information System (NADDIS) information indicating that both registered owner of defendant's car and name on motel registry corresponded to names of suspected drug dealers, together with characteristics of defendants that matched drug courier profile, including their origin from drug source state and their use of type of automobile frequently used to conceal drugs, gave police reasonable suspicion of criminal activity necessary for investigatory stop. U.S.C.A. Const.Amend. 4.

2. Arrest ⇐63.4(11)
Drugs and Narcotics ⇐182.2

Unverified, uncorroborated entry in Narcotic and Dangerous Drug Information System (NADDIS) cannot by itself furnish probable cause for arrest or search. U.S.C.A. Const.Amend. 4.

3. Arrest ⇐63.5(4)

Uncorroborated anonymous 'tip,' even when it comes from law enforcement authorities, does not by itself justify investigatory stop. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐63.5(4)

Mistaken premise can furnish grounds for *Terry* stop, if officers do not know that it is mistake and are reasonable in acting upon it. U.S.C.A. Const.Amend. 4.

5. Criminal Law ⇐1158(2)

Review of district court's determination that investigatory stop is supported by reasonable suspicion was for clear error, rather than plenary. U.S.C.A. Const.Amend. 4.

6. Criminal Law ⇐1181.5(7)

Remand was required to determine whether police officer, who had reasonable suspicion that defendants were drug dealers based on Narcotic and Dangerous Drug Information System (NADDIS) inquiry had probable cause to remove door panel of vehicle and search for drugs, where credibility of officer's testimony that he observed loose door panel had not been determined. U.S.C.A. Const.Amend. 4.

7. Criminal Law ⇐1158(2)
United States Magistrates ⇐29

Standard of judicial review for determination of probable cause is clear error; this is so whether determination is made by magistrate judge or by district judge. U.S.C.A. Const.Amend. 4.

8. United States Magistrates ⇐26

Even if district judge can reject magistrate judge's determinations of credibility without hearing witnesses' testimony himself or herself, he or she cannot be permitted to ignore issue of credibility altogether when making probable cause determination. U.S.C.A. Const.Amend. 4.

9. Criminal Law ⇐1178

Government waived defense of inevitable discovery in determining whether probable cause supported search of door panel in defendants' automobile by failing to defend on appeal magistrate judge's determination that drugs in car's door panel would have been

inevitably discovered by narcotics detection dog even if police officer had not seen loose door panel. U.S.C.A. Const.Amend. 4.

Penelope C. Fleming (argued), Office of U.S. Atty., Milwaukee, WI, for plaintiff-appellee U.S.

Brian W. Gleason (argued), Milwaukee, WI, for defendant-appellant Ismael Ornelas–Ledesma.

Robert G. LeBell (argued), Styler, Kostich, LeBell & Dobroski, Milwaukee, WI, for defendant-appellant Saul Ornelas.

Before POSNER, Chief Judge, and FLAUM and MANION, Circuit Judges.

POSNER, Chief Judge.

Ismael Ornelas–Ledesma and Saul Ornelas were convicted of illegal possession of a controlled substance with intent to distribute it and were sentenced to 60 and 63 months in prison, respectively. The appeal challenges the denial of their motion to exclude from evidence the cocaine seized from "their" 1981 Oldsmobile. We say "their" Oldsmobile, although it was registered to someone else, because the government does not question their right, akin to that of a tenant, bailee, borrower, or other lawful occupier or possessor, to object to the seizure. The cases are quicker to draw the analogy in the case of the driver of a vehicle, *United States v. Garcia*, 897 F.2d 1413, 1418–19 (7th Cir.1990); *United States v. Soto*, 988 F.2d 1548, 1553 (10th Cir.1993); *United States v. Miller*, 821 F.2d 546, 548–49 (11th Cir.1987), than in the case of a passenger, *Rakas v. Illinois*, 439 U.S. 128, 148–49, 99 S.Ct. 421, 433, 58 L.Ed.2d 387 (1978); *United States v. Lechuga*, 925 F.2d 1035, 1037, 1041 n. 3 (7th Cir. 1991); *United States v. Roberson*, 6 F.3d 1088, 1091 (5th Cir.1993), but the government does not ask us to make that distinction here.

The defendants argue that the stop which led to their consenting to the search of the car violated the Fourth Amendment, invalidating the consent and hence the search; and that independently of this the seizure of the drugs, which was from the inside of the door of the car, violated the Fourth Amendment because, even if a superficial search of the car was proper as an incident of the stop, the officers needed and lacked probable cause to open the compartment and seize its contents.

Police officers in Milwaukee keep a regular watch on motels, looking for drug runners. Cruising through a motel parking lot one day in 1992, a detective named Pautz, a two-year veteran of the Milwaukee County Sheriff's Drug Enforcement Unit, spotted a 1981 two-door Oldsmobile with a California license plate. Pautz was interested. Two-door General Motors cars of that vintage are believed by law enforcement authorities to be drug traffickers' favorites (though not their only favorites, *United States v. Sharpe*, 470 U.S. 675, 682 n. 3, 105 S.Ct. 1568, 1573 n. 3, 84 L.Ed.2d 605 (1985); *United States v. Ocampo*, 890 F.2d 1363, 1366 (7th Cir.1989)) because it is easy to conceal drugs in them. And California, like other states on the eastern, western, and southern borders of the United States, is a state from which drugs are shipped to other states, a "source" state. So Pautz called up his dispatcher on his car radio and asked him to find out whom the car was registered to. Now in fact it was registered to "Ornelas, Miguel Ledesma," of San Jose, California, who may or may not be related to one of the defendants. But we do not know what exactly the dispatcher told Pautz or what exactly Pautz understood—whether it was "Miguel Ledesma Ornelas" or "Miguel Ornelas Ledesma." Confusion on this score is understandable, though not justifiable. Spanish naming conventions are confusing to non-Hispanic Americans. When a Hispanic has two surnames, such as Ornelas Ledesma or Ledesma Ornelas, the first is his father's last name and the second his mother's maiden name. The first is primary, and the second subordinate—exactly the reverse of the middle and last names of non-Hispanics. To a Hispanic, therefore, "Ornelas, Miguel Ledesma," would denote Miguel Ornelas Ledesma rather than, as a non-Hispanic would expect, Miguel Ledesma Ornelas. But if the motor vehicle authorities, the dispatcher, or Pautz were unfamiliar with Spanish naming conventions (and Pautz testified that he was unfamiliar with them), "Ledesma" and "Ornelas" could easily get reversed.

Pautz, believing that he had the name of the car's registered owner, entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas had registered at 4:00 a.m. and had been accompanied by another man. Pautz then called his partner, Detective Hurrle, to join him. When Hurrle arrived, the two officers called the Milwaukee office of the Drug Enforcement Administration and asked it to run a NADDIS check on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas. NADDIS (Narcotic and Dangerous Drug Information System) is a computerized compilation of the federal Drug Enforcement Administration's information on known and suspected drug traffickers. NADDIS reported two "hits." One was on Miguel Ledesma Ornelas, also known as Miguel Lemus–Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car. The other "hit" was on Ismael Ornelas, Jr., of Tucson, Arizona, reported by the computer to be a 1000-kilogram-per-month cocaine dealer, although no "wants" or warrants were outstanding against him. The officers did not attempt to obtain descriptions of the two suspected dealers, neither of whom in fact is one of or, as far as we know, related to the defendants.

Because the car was an older GM two-door, because its occupants had checked in at the motel at 4:00 a.m. without having made reservations in advance, because there were two persons rather than just one and at least one of them was Hispanic, and because they apparently had come from a "source state"—and of course because of the "hits" on similar or identical names—the officers decided to stop and question the men when they left the motel. At this point a third officer arrived, Luedke, bringing with him a drug-sniffing dog; and Pautz left. After a time, two men emerged from the motel and entered the Oldsmobile. The officers parked their cars on either side of it. Hurrle tapped the window on the driver's side, identified himself as a police officer, and asked both men for identification. Saul Ornelas, who was in the driver's seat, produced a driver's license in that name; Ismael Ornelas–Ledesma, who was in the front passenger's seat, produced a driver's license in the name of Ismael Ornelas, residing in Martinez, California. Hurrle asked whether there were any drugs in the car. The occupants said "no." Hurrle asked them for permission to search the car, and they gave their permission. The two men were not placed under arrest but the government concedes that a reasonable person in their position would not have felt free to leave. So the encounter was a so-called "*Terry* stop" (after *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); *INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *United States v. Adebayo*, 985 F.2d 1333, 1338–39 (7th Cir.1993), a semi-arrest that is lawful under the Fourth Amendment if but only if the officers had a "reasonable suspicion supported by articulable facts" that the persons stopped were engaged in criminal activity *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

Officer Luedke inspected the interior without canine assistance and noticed a loose panel on the passenger's door. One of the screws by which the panel was fastened to the door was—Luedke testified—rusty. To him this meant that it had been removed recently. He didn't explain why, but maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting. Suspecting that drugs were concealed behind the panel, Luedke pried it open. His hunch was correct; there was a package containing two kilograms of cocaine wrapped in aluminum foil and paper. Ornelas and Ornelas-Ledesma were then arrested.

[1] Clearly, were it not for the NADDIS hits, the officers would not have had grounds for *reasonable* suspicion that the defendants were drug traffickers. Not only is every circumstance on which the officers relied other than the hits innocent taken by itself—many Americans (approximately one in eight) are Californians, many Californians are Hispanic, many Americans drive two-door Gen-

eral Motors cars, many people check into motels very late at night (or early in the morning), many travel in pairs rather than alone, and many do not make advance reservations—but the confluence of these circumstances is pretty innocuous as well, especially since many of the circumstances are correlated rather than independent. Hispanics are disproportionately concentrated in California, and having on average lower incomes than non-Hispanic Americans are doubtless more likely than other Americans to drive two-door rather than four-door cars, older rather than newer cars, and American rather than foreign cars. They are more likely to drive than to fly and, we imagine, less likely to make reservations in advance at motels, since cheap motels don't advertise much or have 800 numbers. Nothing is more common than for people taking long trips to drive until they're tired and then—often at very odd hours—to check in at the nearest motel, of course without a reservation. And people who drive long distances late at night prefer to have someone with them. Because the "suspicious" circumstances (other than the NADDIS hits) are so strongly correlated with each other, were they considered sufficient by themselves to justify a stop the practical consequence would be that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking. Hispanics would be second-class citizens in the eyes of the police. Although a brief investigatory stop is less intrusive than an arrest, it is sufficiently redolent of police-state tactics for courts to insist in the name of the Fourth Amendment that its use be circumscribed.

So we must ask what the NADDIS hits added to a "drug courier profile" that seems only a little better than a dragnet for Hispanics. It would be nice to *know* something about NADDIS, but the government successfully opposed the defendants' efforts to obtain discovery aimed at determining the character and reliability of the information in the NADDIS data base, and as a result the record is bare of evidence about it. At argument the government's lawyer, while saying that she has used NADDIS herself, disclaimed any knowledge about the system except how to access it. We do not know how many names are in it currently, where exactly the names come from, whether any of the information inputted into the system is screened for reliability before being entered, whether anyone checks to make sure that errors are not made in inputting information, whether information is updated systematically, and (a closely related question) whether information discovered to be stale or inaccurate is removed from the system. Although a number of judicial opinions mention NADDIS in passing—obviously it is widely used in drug enforcement—we have found no considered judicial assessment of its reliability, although we have found occasional judicial expressions of concern about that reliability. *United States v. $7,850 United States Currency*, 7 F.3d 1355, 1358 (8th Cir.1993); *United States v. $215,300 United States Currency*, 882 F.2d 417, 419 and n. 2 (9th Cir. 1989) (per curiam); *United States v. Saperstein*, 723 F.2d 1221, 1232 (6th Cir.1983).

Maybe NADDIS is no better than a vast compendium of rumors, errors, and libels: garbage in, garbage out. That seems unlikely. It would not be heavily used by drug enforcement authorities if it were merely a random sample of the American population. Which is not to say, however, that it is *highly* reliable; concern that it may not be is heightened by the (scanty) secondary literature, which depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated. See UPI Release, "VIP Names in Drug Agency's Computer Files," July 3, 1984; Vanessa Jo Grimm, "Behemoth DEA Database Tracks Drug Smugglers," *Government Computer News*, July 8, 1991, p. 85. According to the UPI Release, as of 1984 NADDIS contained 1.5 million names, obtained from debriefings of informants and suspects and from surveillance and intelligence reports of various law enforcement agencies.

[2, 3] As an example of NADDIS's possible unreliability, we note that according to it Ismael Ornelas, Jr., of Tucson, a 1000 kilogram a month dealer—a *large* dealer—is not wanted by any law enforcement authority in the country. Maybe *that* Ornelas (who is neither Saul Ornelas nor Ismael Ornelas-Ledesma nor the registered owner of the

Olds) died years ago or is some practical joker's or desperate informant's fictional creation or is an honest man falsely accused by an enemy. Because the reliability of information stored in NADDIS is unknown, that information must, on the record before us, be reckoned no more reliable than that of an informant not known to be reliable. Therefore, since an uncorroborated tip from such an informant cannot by itself furnish probable cause for an arrest or search, *Illinois v. Gates*, 462 U.S. 213, 227, 103 S.Ct. 2317, 2326, 76 L.Ed.2d 527 (1983), an unverified, uncorroborated entry in NADDIS cannot do so either. *United States v. $7,850 United States Currency*, *supra*, 7 F.3d at 1358; *United States v. $215,300 United States Currency*, *supra*, 882 F.2d at 419 and n. 2; *United States v. Saperstein*, *supra*, 723 F.2d at 1232. The issue here, it is true, is not probable cause, but reasonable suspicion, because we are dealing with a stop rather than an arrest. But the Supreme Court has held that an uncorroborated anonymous tip, even when it comes from law enforcement authorities, does not by itself justify a stop. *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 682, 83 L.Ed.2d 604 (1985). The statement in *United States v. Troka*, 987 F.2d 472, 474 (7th Cir.1993), that "the police department was a reliable source," must be understood in context (the police department was a reliable source *in the circumstances of that case*), rather than as a quixotic effort to overrule the Supreme Court.

[4] That cannot be the end of our analysis, however. NADDIS furnished two tips, not one. "Ismael Ornelas," the name on the motel registry, was very similar to "Ismael Ornelas, Jr.," the name in NADDIS. And while the names Miguel Ornelas Ledesma and Miguel Ledesma Ornelas are as different from each other as Francis Scott Key and Francis Key Scott, the names could easily have been reversed in entering them in the computer, just as "Jr." could easily have been left off a motel registry. So there was some reason to believe that the registered owner of the Olds was the Miguel Ornelas Ledesma, or Miguel Ledesma Ornelas, identified by NADDIS as a suspected drug dealer. Even if NADDIS is not terribly reliable, some or for that matter many entries in it may be accurate or at least approximately so. And the fact that *both* the registered owner of the car *and* the name on the motel registry corresponded more or less to names of suspected drug dealers in the NADDIS database was impressive. One "hit" might well be coincidence; it was much less likely that two—one corresponding to the name in the hotel registry, presumably that of either the driver or the passenger; the other to the name of the registered owner, who might or might not be one of the two men in the motel—were, though this depends in part on how common the names "Ornelas" and "Ledesma" are. Paradoxically, the very unreliability of NADDIS (if it is unreliable) might strengthen the inference that the two men in the Olds were involved in the drug trade; inverting last and middle names is just the kind of mistake that one would expect in a carelessly maintained database. A mistaken premise can furnish grounds for a *Terry* stop, if the officers do not know that it is mistaken and are reasonable in acting upon it. *Illinois v. Rodriguez*, 497 U.S. 177, 184-86, 110 S.Ct. 2793, 2799-2800, 111 L.Ed.2d 148 (1990); *United States v. De Leon-Reyna*, 930 F.2d 396, 399 (5th Cir.1991) (en banc) (per curiam); *United States v. Walraven*, 892 F.2d 972, 974-75 (10th Cir.1989).

The tips were mutually corroborating; and the other circumstances on which the officers relied (the make and type of the car, the state it came from, etc), insufficient as they were by themselves to create a suspicion reasonable enough, substantial enough, to justify the infringement of personal liberty that is brought about by an investigative stop, may, when taken together with the NADDIS "tips," have tipped the balance in favor of a finding of reasonable suspicion. *United States v. Esieke*, 940 F.2d 29, 34 (2d Cir.1991), and *United States v. Morin*, 665 F.2d 765 (5th Cir.1982), factually similar cases although stronger for the government, so suggest. And the Supreme Court held in *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), that an anonymous tip can create reasonable suspicion if corroborated. The form the corroboration took in that case was verification of a prediction made by the informer, but there is no

magic in a particular form of corroboration. The circumstances that first aroused Pautz's suspicions were corroborative of the "anonymous tips" furnished by NADDIS in the sense that they made it likelier than otherwise that NADDIS was, in this instance anyway, accurate. Standing alone, the drug courier profile that first aroused Pautz's suspicions was very little. Standing alone, one NADDIS "hit" could not, in the absence of any evaluation of NADDIS's reliability, be thought much either. The second "hit," however, added to the credibility of the first; and together the profile and the "hits," though still not enough evidence of crime to furnish probable cause to search the car, could satisfy the lesser showing required for a *Terry* stop.

[5] Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; the proposition that review of a district court's determination of reasonable suspicion (if it is a *Terry* stop) or probable cause (if it is an arrest, search, or seizure) is plenary, embraced in such cases as *United States v. Caramillo*, 891 F.2d 620, 626 (7th Cir.1989), is no longer tenable after *United States v. Spears*, 965 F.2d 262 (7th Cir.1992), where, overruling inconsistent precedents, this court held that the standard for judicial review of determinations of probable cause was clear error. There is no basis for distinguishing in this regard between probable cause and reasonable suspicion. They are adjacent points on a continuum.

[6] Since the stop was lawful, we need not decide whether, had it been unlawful, the defendants' consent to search would nevertheless have been valid even though (a relevant factor, though not a decisive one, *Schneckloth v. Bustamonte*, 412 U.S. 218, 231–33, 249, 93 S.Ct. 2041, 2049–51, 2059, 36 L.Ed.2d 854 (1973)) the officers failed to advise the defendants of their right not to consent. *United States v. Valdez*, 931 F.2d 1448, 1451 (11th Cir.1991); *United States v. Valencia*, 913 F.2d 378, 381 (7th Cir.1990). But we do not think the denial of the motion to suppress the drugs seized from the door of the Olds can be upheld on the basis of the record compiled in the district court. The government does not argue that a *Terry* stop justifies so intrusive a search. The only lawful purpose of a search incident to a *Terry* stop is to protect the officers from the danger that the persons they have stopped will reach for a weapon, *Minnesota v. Dickerson*, — U.S. —, —, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993); *Michigan v. Long*, 463 U.S. 1032, 1049–51, 103 S.Ct. 3469, 3481–82, 77 L.Ed.2d 1201 (1983), and ordinarily and here the officers do not have to dismantle a car to satisfy themselves on that score. Nor does the government argue that the consent to search that Ornelas and Ornelas-Ledesma gave the officers was consent to dismantle the car. *United States v. Garcia*, *supra*, 897 F.2d at 1419–20; but cf. *United States v. Pena*, 920 F.2d 1509, 1515 (10th Cir.1990). The seizure was lawful, therefore, only if the search yielded information that gave Officer Luedke probable cause to believe that contraband was secreted behind the loose panel. If so, no search warrant was required, even for a search that would require taking the car apart. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

In arguing that there was probable cause for the search that discovered the drugs secreted in the car door, the government places great weight on the loose panel and the rusty screw. But the screw was not rusty. The magistrate judge to whom the motion to suppress was referred for a recommended ruling looked at the screw and found no indication of rust. The screw is in the appellate record and we have looked at it ourselves. There is not the slightest trace of rust or of anything that looks like rust. It is a Phillips screw and the head contains scratches that suggest it might have been removed and reinserted, but Luedke was adamant that it was signs of rust that caused him to believe that the panel had been removed recently and then put back in place. Having inspected the screw, the magistrate judge naturally disbelieved Luedke's testimony that the screw had looked rusty. Without discussing the bearing of Luedke's testimony about the loose panel on the issue of probable cause, the magistrate judge concluded that the seizure of the drugs had not been supported by probable cause. But noting the presence of the drug-sniffing dog, he found that the drugs would have been discovered anyway and therefore upheld the seizure on the ground of inevitable discovery. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The district judge upheld the seizure, too, but not on the magistrate judge's ground but rather on the ground that the allegedly loose panel alone, which the magistrate judge had not discussed, furnished probable cause. The government defends Luedke's testimony about the rust by arguing that it was dark inside the car (though it was broad daylight) and maybe the screw looked rusty though it wasn't; we are more accustomed to being told of the remarkable eyesight of the police that enables them to see tiny objects at great distances in the dark. *United States v. Sophia*, 900 F.2d 1064, 1073 (7th Cir.1990); *United States v. Gilliard*, 847 F.2d 21, 24 (1st Cir.1988); cf. *United States v. Pinto-Mejia*, 720 F.2d 248, 262 (2d Cir.1983). In any event, the magistrate judge was not required to believe Luedke or recast his testimony in a believable form.

[7] The magistrate judge concluded that Luedke did not have probable cause to seize the drugs; the district judge concluded that he did. Can we uphold the district judge's determination, in view of this disagreement? The standard for judicial review of a determination of probable cause is, as we have noted already, clear error; and this is so whether the determination is made by a magistrate judge or by a district judge. *United States v. Spears*, *supra*; *United States v. Adebayo*, 985 F.2d 1333, 1337 n. 2 (7th Cir.1993). A qualification is necessary, however, for the case in which the magistrate judge, rather than determining probable cause en route to issuing a warrant later challenged by a motion to suppress evidence seized pursuant to it, is merely recommending the disposition of a motion referred to him by a district judge to suppress evidence obtained as a result of a search, or an arrest, made without a warrant. In the first case, the relation between district judge and magistrate judge is that of reviewing court to court of first instance, and the usual standard of appellate review of findings of fact and of the application of a legal standard to such findings applies. In the second case—which is our case—not only may the district judge (with inapplicable exceptions) "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations," 28 U.S.C. § 636(b)(1); he is required "to make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." *Id.*

The question whether the district judge's power of de novo determination authorizes him to reject a magistrate judge's finding of credibility, without the district judge's hearing the witness himself, was left open in *United States v. Raddatz*, 447 U.S. 667, 681 n. 7, 100 S.Ct. 2406, 2415, 65 L.Ed.2d 424 (1980), though with a broad hint, picked up in *Proffitt v. Wainwright*, 685 F.2d 1227, 1237, 1241 (11th Cir.1982), that the answer is "no." See also *Grassia v. Scully*, 892 F.2d 16, 19–20 (2d Cir.1989); but cf. *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir.1988). We need not answer the question here. Rather than reject the magistrate judge's finding that Luedke's testimony about the rusty screw should not be believed, the district judge found probable cause for the seizure in a part of Luedke's testimony that the magistrate judge had not relied upon—the testimony that the panel was loose. A number of cases, illustrated by *United States v. Lugo*, 978 F.2d 631, 637 (10th Cir.1992), treat a loose door panel as a telltale sign of drug running—but not as sufficient in itself to constitute probable cause. (In *United States v. Garcia*, *supra*, 897 F.2d at 1416, the officers saw packages peeping out from behind the loose panel.) The facts of this case show why. The car was eleven years old when Officer Luedke conducted the search. We mean no disrespect to Detroit in observing that the interior of a 1981 Olds unlike that of a Rolls Royce is apt to be rather worn and battered after eleven years. The fact that a door panel is loose does not by itself create a reasonable likelihood that the panel conceals a secret compartment containing contraband. *State v. Swanson*, 172 Ariz. 579, 838 P.2d 1340, 1345–48 (App.1992). Here as in most cases there was more, but not much more:

mainly the NADDIS "hits" of unproven reliability.

[8] We need not decide, however, whether the NADDIS hits (remember that there were two, and that this enhances their reliability), plus the fact that the defendants fit the drug courier profile, plus a loose door panel add up to probable cause—whether in other words the loose panel could turn reasonable suspicion into probable cause. For we do not know whether Luedke's testimony about the door panel should be believed. The only judicial officer who heard him testify was the magistrate judge, who failed to indicate whether he believed the testimony. Since the magistrate judge disbelieved a closely related part of Luedke's testimony, and the district judge did not overturn *that* credibility finding, it can hardly be *assumed* that the magistrate judge would surely have believed Luedke's testimony about the door panel, or that if he had disbelieved it would surely have been reversed by the district judge. Nor did the latter base his determination on a viewing of the car; there was no viewing. Even if, contrary to *Proffitt*, and to decisions involving the parallel case of administrative review of administrative law judges' credibility determinations, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495–97, 71 S.Ct. 456, 468–469, 95 L.Ed. 456 (1951); *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1475–76 (7th Cir.1992); *Ortiz-Salas v. INS*, 992 F.2d 105, 108 (7th Cir. 1993), a district judge can reject a magistrate judge's determinations of credibility without hearing the witnesses' testimony himself, we do not think that he can be permitted to ignore the issue of credibility altogether. We do not think that he can accept challenged testimony given before another judicial officer without giving a reason for resolving the issue himself rather than referring the matter for initial determination by the other officer.

[9] This oversight would be academic if the magistrate judge's alternative ground for upholding the seizure—inevitable discovery by Luedke's dog—was so clearly correct that we could uphold it without the benefit of the district judge's views, as in *United States v. Lewis*, 621 F.2d 1382, 1387 (5th Cir.1980). We cannot. No evidence was presented concerning the dog's capabilities. For all we know he is an infallible sniffer of two kilograms of cocaine wrapped and hidden behind the door panel of a car; but we cannot take judicial notice of this fact. We don't know and have not been told anything about this dog except his name (Merlin), although our own research reveals that a Milwaukee drug-sniffing dog named Merlin, presumably the same beast, has on at least one occasion detected drugs in a piece of luggage when there weren't any. *Schaefer v. United States*, 656 F.Supp. 631, 632 (E.D.Wis.1987). If Merlin is *that* good, no doubt he could sniff the cocaine in the door of the defendants' car, but the government has not had the audacity to argue that a dog who can detect nonexistent drugs is an infallible inevitable discoverer of existent drugs. We may be too hard on Merlin; maybe he sniffed the residue of drugs in the luggage in the *Schaefer* case; maybe it was a different dog with the same name. But the government in its brief, without going so far to confess error on the magistrate judge's alternative ground (that is, inevitable discovery), does not defend it, even though defendant Ornelas had attacked it at some length in his opening brief. The government does not, for example, respond to Ornelas's damaging quotation from the testimony of Detective Hurrle: "I don't know if he [the dog] necessarily would have hit on this particular cocaine." (To which it can be added that we don't know whether the dog would have been directed to sniff in or about the car if Luedke's search had disclosed no suspicious circumstances.) We cannot affirm on a ground that has been waived, *Crane v. Indiana High School Athletic Ass'n*, 975 F.2d 1315, 1319 (7th Cir.1992); *Frederick v. Marquette Nat'l Bank*, 911 F.2d 1, 2 (7th Cir.1990), and the government has waived the defense of inevitable discovery by failing to defend the magistrate judge's determination. Perhaps it did this because it believed that the determination could not be defended. It put all its eggs in the probable-cause basket, and the eggs are broken.

The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw. For while it is plain that it is not rusty, it does look as if it had been scratched in just the way one would expect if it had been removed and reinserted, though its appearance could we suppose reflect its removal by Officer Luedke or other handling since. The test for probable cause is objective. It is not what the officer in question actually believed but what a reasonable officer in his position would have believed. *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978); *Mahoney v. Kesery*, 976 F.2d 1054, 1057–58 (7th Cir.1992). A reasonable officer would not have believed the screw rusty but might have believed it showed (other) evidence of having been removed and reinserted. That is a matter to be explored on remand.

The judgments of conviction are vacated and the case is remanded for further proceedings consistent with this opinion. The other grounds raised by the appellants have too little merit to warrant discussion.

VACATED AND REMANDED.

Walter SPEARMAN, Plaintiff-Appellant,

v.

EXXON COAL USA, INC.,
Defendant-Appellee.

No. 92-3837.

United States Court of Appeals,
Seventh Circuit.

Argued May 14, 1993.

Decided Feb. 11, 1994.

Former employee who was terminated due to excessive absenteeism brought retaliatory discharge claim in Illinois state court alleging that discharge violated employee's rights under Illinois workers' compensation laws. Employer removed case. The United States District Court for the Southern District of Illinois, William L. Beatty, J., entered judgment in favor of employer in accordance with jury verdict. Employee appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that retaliatory discharge did not arise from workers' compensation law, so as to preclude removal of case to federal court.

Affirmed.

Ilana Diamond Rovner, Circuit Judge, dissented and filed opinion.

1. Removal of Cases ⇐3

Retaliatory discharge claim asserted by employee discharged due to excessive absence did not arise under "workmen's compensation laws" of Illinois, so as to preclude removal under federal statute; claim was fault based regime with common-law damages. 28 U.S.C.A. §§ 1441(a), 1445(c).

See publication Words and Phrases for other judicial constructions and definitions.

2. Removal of Cases ⇐3

Even case containing federal claim may not be removed if it also arises under state workers' compensation law. 28 U.S.C.A. § 1445(c).

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT- WITHOUT ORAL ARGUMENT

Date: April 18, 1995

BEFORE: **Honorable** RICHARD A. POSNER, Chief Judge

Honorable JOEL M. FLAUM, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Nos. 94-3349 and 94-3350

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

SAUL ORNELAS and ISMAEL ORNELAS LEDESMA,
Defendants - Appellants

Appeals from the United States District Court for the
Eastern District of Wisconsin
No. 92 CR 243, Rudolph T. Randa, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1060-110393)

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
SEP 20 1995
OFFICE OF THE CLERK

No. 95-5257

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

RECEIVED
AFTER HOURS
SEP 20 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Whether the court of appeals, accepting the facts the district court found as not clearly erroneous, was required to review de novo the district court's determination that those facts demonstrated probable cause for a search.

2. Whether the district court properly declined to require the government to produce information relating to the reliability of the Drug Enforcement Agency's Narcotic and Dangerous Drug Information System (NADDIS).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-5257

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals affirming petitioners' convictions (Pet. App. 147-148) is unreported, but the judgment is noted at 52 F.3d 328 (Table). The earlier opinion of the court of appeals vacating the convictions and remanding for further proceedings (Pet. App. 149-157) is reported at 16 F.3d 714. The opinions of the district court (Pet. App. 95-99, 110-11, 112-119) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1995. The petition for a writ of certiorari was filed on

July 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering conditional guilty pleas in the United States District Court for the Eastern District of Wisconsin, petitioners were convicted of possessing a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Ornelas-Ledesma was sentenced to 60 months' imprisonment, and petitioner Ornelas was sentenced to 63 months' imprisonment. On petitioners' appeal from the denial of their motion to suppress, the court of appeals vacated the judgments of conviction and remanded for further proceedings. Pet. App. 149-157. On remand, the United States magistrate judge recommended that the motion to suppress be granted, but the district court sustained the government's objection to the magistrate judge's recommendation and denied the suppression motion. The court of appeals affirmed. Pet. App. 147-148.

1. The facts are set forth in the opinions of the court of appeals, Pet. App. 147-148, 149-157, and are not in dispute. While cruising through a motel parking lot in Milwaukee, Wisconsin, in 1992, Detective Pautz of the Milwaukee County Sheriff's Office spotted a 1981 two-door Oldsmobile with a California license plate. Based on his training and experience in drug interdiction, Pautz knew that narcotics traffickers often use older two-door General Motors cars because it is easy to conceal drugs in them, and that California is a "source" State

from which drugs are shipped to other States. Pautz asked his dispatcher to find out to whom the car was registered. The dispatcher responded either that the registered owner was Miguel Ledesma Ornelas or that he was Miguel Ornelas Ledesma -- Pautz was unsure whether the dispatcher indicated that the name "Ledesma" came before or after the name "Ornelas." Pet. App. 124, 150.

Believing that he had the name of the car's registered owner, Detective Pautz entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas and another man had registered at 4:00 a.m. Pautz called his partner, Detective Hurrle to join him. After Hurrle arrived, the two officers contacted the local office of the Drug Enforcement Agency (DEA) and asked it to run a check, through its Narcotic and Dangerous Drug Information System (NADDIS), on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas.[1] NADDIS reported two "hits," i.e. records of known or suspected criminal activity. One identified Miguel Ledesma Ornelas as a 47-year-old Hispanic male, five feet six inches tall and weighing 150 lbs., who was a suspected heroin dealer in El Centro, California. The other identified Ismael Ornelas, Jr., of Tucson, Arizona, as a suspected 1,000-kilogram-per-month cocaine dealer. The officers did not attempt to obtain further descriptions of the two suspected dealers. Pet. App. 125, 151.

---

[1] NADDIS is a computerized compilation of DEA's information on known and suspected drug traffickers.

After a time, two men left the motel and got into the Oldsmobile. Detective Hurrle approached the car, identified himself as a police officer, and asked the men for identification. Saul Ornelas, the driver, produced a driver's license in that name. Ismael Ornelas-Ledesma, who was in the front passenger's seat, produced a driver's license in the name of Ismael Ornelas. After the two denied that there were any drugs in the car, Hurrle asked them if he could search the car, and they consented to the search. Pet. App. 151.

The search of the interior of the car was conducted by Officer Luedke, who had arrived in the meantime with a drug-sniffing dog. During his inspection, which he conducted without the aid of the dog, Luedke noticed a loose panel on the passenger-side door. One of the screws used to fasten the panel to the door was, according to Luedke, rusty, and he believed that the rust indicated that the screw had recently been removed.[2] Luedke pried the panel open, uncovering a package containing two kilograms of cocaine. The officers then arrested petitioners. Pet. App. 151.

2. Petitioners filed pre-trial motions to suppress the cocaine found in the car and to obtain discovery of printout copies of the results of the NADDIS checks and the "raw data" used to create the NADDIS entry. The magistrate judge found that

---

[2] The court of appeals stated that Luedke did not explain the basis for his inference, but that "maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting." Pet. App. 151.

petitioners were lawfully subjected to an investigatory detention based on reasonable suspicion, Pet. App. 134-135, and that they validly consented to the search of the car, id. at 135-136. See id. at 140. The magistrate judge concluded, however, that the consent did not extend to the removal of the door panel, and that a search behind the panel was not supported by the requisite probable cause. Id. at 136.[3] Nonetheless, the magistrate judge denied the suppression motion under the inevitable discovery exception to the exclusionary rule, concluding that the drugs inevitably would have been detected by the drug-sniffing dog. Pet. App. 137-138, 140.

The magistrate judge also denied petitioners' request for discovery in light of the government's representation that "neither NADDIS nor the motor vehicle license plate information were [sic] ever printed out from the computer." Pet. App. 120. The magistrate judge concluded that "[s]ince the materials which the defendants seek do not exist, they obviously cannot be disclosed." Ibid. The magistrate judge further concluded that petitioners had failed to show that the requested "raw data" qualified as exculpatory information within the meaning of Brady

---

[3] The magistrate judge stated that "Luedke's clear testimony was that rust within the groove of the head of the Phillips screw holding the plastic vent cover in place caused him to believe it had been removed and drugs were concealed within the door panel. But, the screw itself belies this testimony. The record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband. Consequently, the Court finds there was not probable cause to dismantle the panel." Pet. App. 136.

v. Maryland, 373 U.S. 83 (1963), or that it was discoverable under Fed. R. Crim. P. 16. Pet. App. 121.

The district court accepted the magistrate judge's recommendation that the suppression motion be denied, but on a different theory. Pet. App. 112-119. The court agreed with the magistrate judge that the investigatory stop and consent search were valid, but concluded that it was unnecessary to invoke the inevitable discovery doctrine because, in its view, the search behind the door panel was supported by probable cause. The district court found that the drug courier profile (i.e. the model and State of origin of the car and the fact that two men traveling together checked into the motel at 4:00 a.m.), the two NADDIS "hits," and the loose door panel constituted probable cause to remove the door panel and search for drugs. Id. at 116-118. The district court also upheld the magistrate judge's denial of petitioners' discovery motions as not "clearly erroneous." Id. at 110-111.

3. The court of appeals, following United States v. Spears, 965 F.2d 262 (7th Cir. 1992), applied a clear-error standard of review to the district court's determinations of reasonable suspicion and probable cause. The court held that the district court did not commit clear error in ruling that the stop was supported by reasonable suspicion, although it regarded the question as "close." Pet. App. 154. Because the reliability of the information stored in NADDIS was unknown, the court treated a NADDIS "hit" as no more reliable than a tip from an informant not

known to be reliable -- that is, as insufficient without corroboration to support a stop. Id. at 153. The court concluded, however, that there was sufficient corroboration to establish reasonable suspicion. The corroborative facts included the make and age of the car, its "source state" origin, the 4:00 a.m. motel check-in without advance reservations, and the fact that the two NADDIS "hits," although ultimately proving to have identified individuals other than the petitioners, appeared to the officers at the time to be mutually reinforcing. Id. at 151.

The court of appeals was satisfied that the facts reflected grounds for a reasonable suspicion, but held that they did not support the determination of probable cause to remove the door panel. Pet. App. 154-155. The key fact informing the district court's probable cause ruling was Officer Luedke's testimony that the door panel was loose, id. at 117, but the magistrate judge had not made any finding as to the credibility of that testimony, id. at 127.[4] Accordingly, the court of appeals vacated the convictions and remanded the case to the district court for further proceedings, stating that

> it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the

[4] The court held that the government had waived the inevitable discovery claim, and that, in any event, it could not have accepted that claim in the absence of evidence regarding the dog's capabilities and intended use. Pet. App. 156.

> loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel.

Id. at 156-157.

The court of appeals rejected petitioners' other claims, including their challenge to the denial of their discovery motions, as "hav[ing] too little merit to warrant discussion." Pet. App. 157.

4. On remand, the district court referred the matter to the magistrate judge for an initial determination, and the magistrate judge recommended that the suppression motion be granted. Pet. App. 100-107. The parties stipulated to resolution of the matter on the existing record. Id. at 106. The magistrate judge expressly accepted the credibility of Officer Luedke's testimony that the door panel was loose, but concluded that "the loose panel alone, given the age of the Oldsmobile, is not probative evidence of the fact it necessarily had been recently removed." Id. at 102-103. The NADDIS "hits" and other factors alone were not, in his view, sufficient to establish probable cause to remove the panel. Id. at 107.

The district court rejected the magistrate judge's recommendation and denied the suppression motion, affirming its own initial determination that probable cause had been established. Pet. App. 95-99. The court commented that, "viewed individually," the facts "may be unremarkable," but "they become more meaningful when, in a specific case, they converge and form

around two specific individuals." Id. at 97. The district court viewed the loose door panel as "the final fact in a string of unbroken facts which establishes the probable cause equation." Id. at 99.

5. On appeal after remand, the court of appeals, applying the "clear error" standard of review, upheld the district court's determination that the removal of the door panel was supported by probable cause. Pet. App. 147-148. The court stated that the district court's opinion "adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search." Ibid.

ARGUMENT

1. Petitioners contend that, in affirming the district court's rulings that the investigative stop was supported by reasonable suspicion and that removal of the car door panel was supported by probable cause, the court of appeals used the wrong standard of review, and that the ruling should have been reviewed de novo instead of for clear error. Pet. 11-32.

a. There is a conflict among the circuits on the proper standard of review of determinations of probable cause and reasonable suspicion. Several courts of appeals have held that whether particular facts constitute probable cause or reasonable suspicion is a legal issue subject to de novo review. See, e.g., United States v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992); United States v. Ramos, 933 F.2d 968, 972 (11th Cir. 1991), cert.

denied, 503 U.S. 908 (1992); United States v. Patrick, 899 F.2d 169, 171 (2d Cir. 1990); United States v. Hoyos, 892 F.2d 1387, 1392 (9th Cir. 1989), cert. denied, 498 U.S. 825 (1990); United States v. Ishmael, 48 F.3d 850, 853 (5th Cir. 1995); United States v. Martinez-Perez, 941 F.2d 295, 297 (5th Cir. 1991), cert. denied, 503 U.S. 920 (1992). The First Circuit, like the Seventh, appears to apply the "clearly erroneous" standard, but without distinguishing between the factual and legal aspects of a probable cause determination. See, e.g., United States v. Santana, 895 F.2d 850, 852 (1st Cir. 1990). In other courts, the cases have not followed a uniform approach. Compare United States v. McGlory, 968 F.2d 309, 342 (3d Cir.) (clear error), cert. denied, 113 S. Ct. 415, 627, 1388 (1992), with United States v. Edwards, 53 F.3d 616, 618 (3d Cir. 1995) (de novo); United States v. Williams, 10 F.3d 1070, 1074 (4th Cir. 1993) (de novo), cert. denied, 115 S. Ct. 313 (1994), with United States v. Porter, 738 F.2d 622, 624 (4th Cir.) (en banc) (clear error), cert. denied 469 U.S. 983 (1994); United States v. Padro, 52 F.3d 120, 122 (6th Cir. 1995) (de novo) with United States v. Hofstatter, 8 F.3d 316, 322 (6th Cir. 1993) (clear error), cert. denied, 114 S. Ct. 1101 (1994); United States v. Travis, 993 F.2d 1316, 1324 (8th Cir.) (clear error), cert. denied, 114 S. Ct. 229 (1993), with United States v. Turpin, 920 F.2d 1377, 1384 (8th Cir. 1990) (de novo), cert. denied, 499 U.S. 953 (1991); United States v. Kopp, 45 F.3d 1450, 1452 (10th Cir. 1995) (de novo), cert. denied, 115 S. Ct. 1721 (1995), with United States v. Fox,

902 F.2d 1508, 1513 (10th Cir.) (clear error), cert. denied, 498 U.S. 874 (1990).

We agree with petitioners that a district court's conclusion that certain facts amount to probable cause is subject to de novo review. The question whether an arrest is supported by probable cause is a mixed question of law and fact -- that is, a question "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). Thus, a district court's findings of "historical facts" may be reversed on appeal only where the findings are "clearly erroneous." See, e.g., Maine v. Taylor, 477 U.S. 131, 145 (1986). But the application of the legal standard of probable cause to those facts presents a question of law, and on that issue appellate review should not be similarly circumscribed. Cf. Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (regarding voluntariness of a confession, reviewing court shows deference to factual findings but "the ultimate issue of 'voluntariness' is a legal question" requiring "independent" determination); Miller v. Fenton, 474 U.S. 104, 110, 117 (1985) (same); Ker v. California, 374 U.S. 23, 33-34 (1963) (review of state court determination of constitutionality of search requires "an independent examination of the facts, the findings and the record" to determine whether the search was reasonable).

In adopting its rule that probable cause determinations should be reviewed for clear error, the Seventh Circuit relied on Illinois v. Gates, 462 U.S. 213 (1983). See United States v. Spears, 965 F.2d 261, 269-272 (7th Cir. 1992).[5] Gates instructed that, in cases in which a magistrate has determined that an affidavit shows probable cause and has issued a warrant, "after-the-fact scrutiny by courts of the sufficiency of [the] affidavit should not take the form of de novo review"; rather, "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" 462 U.S. at 236 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)). Reviewing courts need only ensure that the issuing magistrate judge had a "substantial basis" to conclude that probable cause existed, id. at 238-239 -- a standard of review that the Seventh Circuit treats as equivalent to review for clear error. Spears, 965 F.2d at 270. Because the standard applicable to an initial determination of probable cause is the same in both warrant and nonwarrant cases, the Seventh Circuit concluded that "it would be anomalous to require a more searching review of a district judge's probable cause determination" in nonwarrant cases than of the issuing magistrate's determination in warrant cases. Id. at

[5] In Spears, the Seventh Circuit took note of confusion in its precedents regarding the proper standard of review and set out its basis for adopting a deferential approach in both warrant and nonwarrant cases. 965 F.2d at 268-269. The court observed that, "[b]ecause this decision changes the law of the circuit, we have circulated this opinion to all active judges * * *. A majority of the judges has voted not to rehear the case en banc." Id. at 269 n.2.

270. Accordingly, the court took the view that the "clearly erroneous" standard applies in both contexts.

The Seventh Circuit's reasoning ignores this Court's rationale in Gates for reaffirming the principle of deference to a magistrate judge's finding of probable cause to issue a warrant. The deferential standard of review applied to the probable cause determination of a magistrate who has issued a warrant reflect "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant," 462 U.S. at 236, and thereby "serves the purpose of encouraging recourse to the warrant procedure," id. at 237. If warrants were due no greater deference than judicial probable cause determinations in non-warrant cases, "police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search." Id. at 236. That rationale for deference to probable cause determinations plainly does not apply in cases involving warrantless searches.

b. The question whether a de novo or deferential standard of review should apply to a district court's determination that a warrantless search was justified by probable cause may merit this Court's review in an appropriate case. In Baron v. United States, No. 88-6448, the government suggested that the Court grant the petition to address that issue, but the Court denied review. 490 U.S. 1040 (1989). Subsequently, in a case that raised the same issue, the government reiterated that the de novo

standard is correct, but opposed certiorari on the ground that the outcome would not be affected by the standard of review applied; this Court nevertheless granted the petition, vacated the judgment, and remanded the case to the Sixth Circuit for further consideration in light of the position asserted by the Solicitor General. Williams v. United States, 500 U.S. 901 (1991). On remand, the Sixth Circuit viewed itself as bound by circuit precedent to apply a clearly erroneous standard and did not reexamine that issue. The court determined, however, that the probable cause determination would be upheld under either a de novo or a deferential standard, and the court accordingly reaffirmed its prior judgment. Williams v. United States, 949 F.2d 220, 221-222 (1991). This Court denied certiorari. 504 U.S. 958 (1992).

While the Court could follow the same course as it followed in Williams, we suggest that the better approach is to deny the petition outright. As in Williams, we submit that the district court's reasonable suspicion and probable cause determinations were correct and should be upheld under either standard of review. There was ample corroboration of the NADDIS hit -- the age and make of the car, its "source" state license, and the late hour of the unreserved motel check-in -- to support a reasonable suspicion of criminal activity. And those facts, when considered with the discovery of the loose panel in the car door that could readily conceal drugs, supplied probable cause for the search. Indeed, while the court of appeals in this case said that the

clear error test was controlling under circuit precedent, as had the government in its brief on appeal (see Gov't C.A. Br. 21-22), the court's careful examination of the particular facts that bore on probable cause closely resembles the inquiry that would occur in reviewing a probable cause determination de novo. See Pet. App. 151-157. Accordingly, the outcome of this case is not likely to change, regardless of the standard applied. In those circumstances, we believe that the petition should be denied.[6]

2. Petitioners contend that the district court improperly refused to compel the government to produce NADDIS printouts of, and the raw data underlying, the two NADDIS "hits." Pet. 32-49. Relying on Brady v. Maryland, 373 U.S. 83 (1963) (see Pet. 43), they assert that they needed the NADDIS data in order to be able to undercut the reliability of the NADDIS "hits" as factors supporting the stop and search of their car. Petitioners did not preserve that issue for appellate review when they entered their conditional guilty pleas. See Gov't C.A. Br. 1. In any event, review of that factbound claim is not warranted.

It is questionable whether Brady applies in the suppression context. Under Brady, the prosecution's failure to turn over evidence favorable to the accused upon request violates due

---

[6] We do not believe the Court should hold the instant petition pending its decision in Thompson v. Keohane, No. 94-6615 (cert. granted, Jan. 23, 1995), which raises the question of the correct standard of review -- de novo or "clearly erroneous" -- in a federal habeas corpus proceeding of a state court's determination that a suspect was in custody for purposes of the Miranda rule. It is unlikely that the decision in Thompson will control the disposition of this case, which does not arise in a habeas context, and addresses probable cause rather than custodial status.

process where "the evidence is material either to guilt or to punishment." 373 U.S. at 87. The inquiry into whether the government obtained evidence in violation of the Fourth Amendment does not bear on the ultimate question of guilt or innocence.

But regardless of the proper analysis of that issue, petitioners have not shown that Brady would have been violated here. Because "the reliability of information stored in NADDIS [wa]s unknown," Pet. App. 153, the court of appeals substantially discredited the NADDIS "hits," treating them as "no more reliable than [tips from] an informant not known to be reliable." Ibid. Pet. App. 153. In view of that treatment, the only discovery potentially material to the issues at the suppression hearing would have been information showing the "hits" to be so patently unreliable that a reasonable officer on the scene would have given them even less credence than did the court of appeals. Petitioners rely on mere speculation that they could have further discredited the information (see Pet. 41), and speculation is insufficient to support a Brady claim. See United States v. Agurs, 427 U.S. 97, 109-110 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense * * * does not establish 'materiality' in the constitutional sense."); United States v. Carson, 9 F.3d 576, 583 (7th Cir. 1993), cert. denied, 504 U.S. 926 (1992); United States v. Driscoll, 970 F.2d 1472, 1482 (6th Cir.), cert. denied, 113 S. Ct. 1056 (1993); United States v. Pitt, 717 F.2d 1334, 1338-1339 (11th Cir.), cert. denied, 465 U.S. 1068 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

SEPTEMBER 1995

DISTRIBUTED
OCT 20 1995

No. 95-5257

Supreme Court, U.S.
FILED
OCT 18 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

Robert G. LeBell
Attorney for Petitioner
Saul Ornelas
100 E. Wisconsin Avenue, Suite 1700
Milwaukee, WI 53202

Brian W. Gleason
Attorney for Petitioner
Ismael Ornelas-Ledesma
230 W. Wells, Suite 702
Milwaukee, WI 53203

No. 95-5257

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

The government, in its brief, has acknowledged the conflict among the circuits in the proper standard of review for determination of probable cause and reasonable suspicion. Respondent's brief, p. 9. Moreover, the government agreed with the Petitioners' position that, a district court's conclusion that certain facts amount probable cause, is subject to de novo review, Respondent's brief, p. 11. The government concludes that the disparate circuit courts' standards may merit this court's review in an appropriate case. However, in the opinion of the respondent, the case at bar, should not be granted certiorari because the suppression result would remain unaffected despite which standard

was applied. The petitioners maintain, conversely, that a de novo review on appeal, would have resulted in a different outcome. The fact situation, as previously outlined in petitioners' pleadings, demonstrate that the decision by the court of appeals, in affirming the trial court's ruling, was not a heartfelt endorsement, (Emphasis added). Rather, the Court of Appeals noted:

> "Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop." United States v. Ornelas, 16 F3d 714, 719 (7th Cir, 1994).

The court further advised; "Clearly, were it not for the NADDIS hit, the officers would not have had grounds for reasonable suspicion that the defendants were drug dealers, Ornelas, supra, p. 716.

The government opines that "there was ample corroboration of the NADDIS hit -- the age and make of the car, its "source" state license and the late hour of the unreserved motel check-in ..." Respondent's brief, p. 14. The Court of Appeals could not have more pointedly disagreed. Chief Judge Posner wrote the following in consideration of the component parts claimed by the government to support the drug courier profile;

> "Not only is every circumstance on which the officers relied other than the hits innocent taken by itself -- many Americans (approximately one in eight) are Californians, many Californians are Hispanic, many Americans drive two-door General Motors cars, many people check into motels very late at night (or early in the morning), many travel in pairs rather than alone, and many do not make advance reservations -- but the confluence of these circumstances is pretty innocuous as well, especially since many of the circumstances are correlated rather than independent. Hispanics are disporportionately concentrated in California, and having

on average lower incomes than non-Hispanic Americans are doubtless more likely than other Americans to drive two-door rather than four-door cars, older rather than newer cars, and American rather than foreign cars. They are more likely to drive than to fly and, we imagine, less likely to make reservations in advance at motels, since cheap motels don't advertise much or have 800 numbers. Nothing is more common than for people taking long trips to drive until they're tired and then -- often at very odd hours -- to check in at the nearest motel, of course without a reservation. And people who drive long distances late at night prefer to have someone with them. Because the "suspicious" circumstances (other than the NADDIS hits) are so strongly correlated with each other, were they considered sufficient by themselves to justify a stop the practical consequence would be that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking. Hispanics would be second-class citizens in the eyes of the police." Ornelas, supra, p. 717.

The court further noted,

"So we must ask what the NADDIS hits added to a 'drug courier profile' that seems only a little better than a dragnet for Hispanics". Ornelas, supra, p. 717.

The facts at bar did present a "close question" for the appellate tribunal. Had the court conducted a de novo review instead of applying the clearly erroneous and deferential standard, the lower finding of probable cause would not have been affirmed. Accordingly, petitioners request that this court grant certiorari. Alternatively, it is requested that this court remand the matter to the Seventh Circuit in order that a panel conduct a de novo review, (see Williams v. United States, 500 U.S. 901 (1991).

Petitioners and the government agree that the appropriate standard of review in non-warrant cases is de novo. Because the Seventh Circuit and a number of other jurisdictions use the more deferential clearly erroneous standard, thousands of cases are

arguably decided by the wrong standard. This affects, not only criminal defendants, but also government appellants. The court should put an end to such disparate practice by articulating a uniform standard of review.

Respectfully submitted this 18th day of October, 1995.

Robert G. LeBell
Attorney for Petitioner
Saul Ornelas

Brian W. Gleason
Attorney for Petitioner
Ismael Ledesma-Ornelas

STYLER, KOSTICH, LeBELL, DOBROSKI & McGUIRE
ATTORNEYS AND COUNSELORS AT LAW

DONALD P. STYLER
NIKOLA P. KOSTICH
ROBERT G. LeBELL
JOHN D. DOBROSKI
RICHARD P. McGUIRE, JR.
Court Commissioner
JOHN M. KREJCI

October 18, 1995

CLERK OF COURT FOR THE
UNITED STATES SUPREME COURT
ONE FIRST STREET NE
WASHINGTON, DC 20543

Re: Ismael Ornelas-Ledesma and Saul Ornelas, Petitioners v. United States of America, Case No. 95-5257

Dear Clerk:

Please find enclosed, original and 10 copies of the Petitioners' Reply Brief and Affidavit of Service in the above entitled matter.

By copy of this letter, same is being served upon the offices of Drew S. Days, III, Solicitor General.

Very truly yours,

STYLER, KOSTICH, LeBELL,
DOBROSKI & McGUIRE

Robert G. LeBell
State Bar No. 01015710

RGL:eas
Encl.

cc: Drew S. Days, III, Solicitor General
(w/encl.)

RECEIVED
OCT 19 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Telephone (414) 276-1233
100 East Wisconsin Avenue
Suite 1780
Milwaukee, Wisconsin 53202-4115
Fax: (414) 276-6374

STATE OF WISCONSIN)
) ss.
COUNTY OF MILWAUKEE)

AFFIDAVIT OF SERVICE

I, Eve A. Schneider, hereby state that on the 18th day of October, 1995, in the case entitled Ismael Ornelas-Ledesma and Saul Ornelas, Petitioners v. United States of America, Case No. 95-5257, that I personally handed an original and 13 copies of the Petitioners' Reply Brief, to a Federal Express messenger to be delivered to the following:

1 original and 10 copies:
CLERK OF COURT FOR THE
UNITED STATES SUPREME COURT
ONE FIRST STREET NE
WASHINGTON, DC 20543

3 copies:
DREW S. DAYS, III
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
10TH ST AND CONSTITUTION AVE NW
WASHINGTON, DC 20530

Eve A. Schneider

Subscribed and sworn to before me
this 18th day of October, 1995.

Notary Public, Milwaukee, Wisconsin
My commission expires: 1/26/97

RECEIVED
OCT 19 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(6)
Supreme Court, U.S.
FILED
DEC 4 1995
CLERK

No. 95-5257

In The

Supreme Court of the United States

October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

DREW S. DAYS, III
Solicitor General
Room 5614
United States Department
of Justice
10th St. and Constitutional Av. N.W.
Washington, D.C. 20530
(202) 514-4283

BRIAN W. GLEASON
230 W. Wells Street
Suite 702
Milwaukee, Wisconsin 53203
(414) 277-5076
Counsel for Petitioner Ismael Ornelas-Ledesma

ROBERT G. LEBELL
STYLER, KOSTICH, LEBELL
DOBROSKI & MCGUIRE
100 East Wisconsin, Suite 1700
Milwaukee, Wisconsin 53202-4114
(414) 276-1233
Counsel for Petitioner Saul Ornelas

Petition For Certiorari Filed July 17, 1995
Certiorari Granted June 6, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Selected Docket Entries 1

Magistrate Judge's Recommendation to the Honorable Rudolph T. Randa and Order, dated February 12, 1993 7

Decision and Order of District Court, denying motions to suppress statements and evidence, dated March 9, 1993 28

Petitioners' motion for reconsideration and inspection of automobile dated March 11, 1993 37

Partial transcript of March 11, 1993 oral ruling by district court denying motion for reconsideration and request for joint inspection of the automobile 41

Judgment of Conviction of Ismael Ornelas-Ledesma 45

Judgment of Conviction of Saul Ornelas 48

Published Decision and Order of the United States Court of Appeals, for the Seventh Circuit, dated February 10, 1994, vacating judgments and remanding to the district court 55

Remand Order of district court referring to magistrate judge for credibility determination of prior testimony of officer Luedke, dated March 15, 1994 74

Magistrate Judge's Post-Remand Recommendation to the Honorable Rudolph T. Randa, dated March 29, 1994 76

Decision and Order of the district court, dated September 20, 1994 85

TABLE OF CONTENTS – Continued

Page

Unpublished Decision and Order of the United States Court of Appeals for the Seventh Circuit, dated April 18, 1995 91

Judgment-Without Oral Argument, of the United States Court of Appeals for the Seventh Circuit, dated April 18, 1995 93

SELECTED DOCKET ENTRIES *

*The docket numbers are those used in Ismael Ornelas-Ledesma's case. The docket numbers for Saul Ornelas are in brackets.

Date	Number	
12-30-92	12	Deft.'s motion to suppress seizure of items from the 1981 Olds. and the statement of the deft. taken at the scene & later that day at the station-house. (No supporting brief).
12-31-92	[12]	Deft's statement on motions.
12-31-92	[13]	Deft's motion to suppress statements; Memorandum in support of motion.
12-31-92	[14]	Deft. notice of motion and motion to suppress and exclude physical evidence; memorandum in support of motion.
1-11-93	14	Govt' memorandum in response to deft.'s pretrial motions.
1-12-93	[20]	Deft's reply; affidavit of deft.
1-14-93	16	Deft.'s reply to Gov't memorandum in response to deft.'s motion to suppress the seizure of items from the 1981 Olds and the statements of the deft. taken at the scene and later at the stationhouse.
1-15-93	18	Deft's motion to supplement reply brief.

1-15-93	[22]	Affidavit of Saul Ornelas.
1-21-93	24	HEARING (RLB) Evidentiary hearing. Interpreter (C. Ward) swore. Govt. addresses crt. as to contested facts. Crt. finds Gov't. has not fulfilled burden as to 6.03. Witness test. given. Gov't. offers Ex. 1, 2, & 2A. Exhibits and transcripts received. Crt. admits exh. 3 & 4. Gov't. objects as to #4.
1-22-93		HEARING (RLB) Evidentiary hearing cont'd. Gov't. addresses crt. as to Ex. 2A. Crt w/allow deft. to listen to original tape. Witness test. given. Gov't offers Ex. 6 & 6A. Atty LeBell objects. Integrity of tape in question. Crt. w/accept Ex. 6 and 6A. Govt. Ex. 5 received. Deft. offered Ex. D. Crt. allows. Ex. B. offered and received. Ex. 7 offered and admitted. Ex. F. G. & H. offered and admitted. Ex. I & J offered and admitted. Gov't. objects.
1-25-93		HEARING (RLB) Evidentiary Hearing Contd. Govt. moves to quash subp. of witness Allen & docs. Crt. holds motion in abeyance. Crt. will not order hard copy of NADDIS ck. on 12/11/92 Exh. 12 offered Govt. objects. Crt. will allow. Defts. seeks metallurgist expert. Crt. directs motions made to RTR. [District Court judge]. BRIEFS due 2-9-93 at 5:00 p.m. Atty Gleason seeks until 1-29-93 to obtain expert & supplement. Crt. w/allow further evidence.

		Counsel w/make proffer to Govt. Briefing w/remain as set.
1-28-93		HEARING (RLB) Evidentiary hearing re: screw. Crt. has conferred w/Govt. and counsel. Govt. produced screw indicated at previous hrg. Parties believe should be admitted into evidence. Govt. waives deft. presence. Atty Gleason h/no objections. Govt. offers and crt. receives screw as Ex. AA. Stipulated by Govt. that screw has no rust. Crt. examined-can see no rust. Deft. W/D motion to have screw analyzed.
2-8-93	43	Brief of Ismael Ledesma in support of motion to suppress statements and items seized f/automobile.
2-9-93	29	Govt. memo in response to deft. pretrial motions.
2-9-93	[31]	Deft.'s brief in support of motion to suppress statements and items seized from the automobile.
2-12-93	30a	RECOMMENDATION (RLB). to Judge Randa RECOMMEND an order DENYING deft's motion to suppress seizure of items f/1981 Olds. & statements of deft. Objection t/be filed on or before 2/19/93 at 8:30.
2-17-93	[35]	Deft's Objections to Magistrate Judge's Recommendations.
2-18-93	[36]	Govt's objections to Magistrate Judge's Recommendations.

2-19-93	31	Deft. objections to Magistrate recommendations.
3-9-93	35	ORDER (RTR) that defts' objections to Mag.'s recommendations be OVERRULED; Defts' motions to suppress certain post-arrest statements and physical evidence be DENIED.
3-11-93	36	HEARING (RTR) Deft. motion for reconsideration is DENIED. Deft. enters conditional guilty plea. – R. 11(a)(2) to count 1 of the indictment. ADJUDGED GUILTY. Sentencing set for 5-20-93 at 10:00 a.m. in rm. 253. Mr. Gleason's request for transcripts is GRANTED. Deft. remanded to custody.
3-11-93	[41]	HEARING (RTR) Change of plea. Interpreter present. Deft's motion for reconsideration is DENIED. Deft. enters a conditional plea – R.11(a)(2) to court [sic] 1 of the indictment. ADJUDGED GUILTY. Sentencing set for 5/20/93 at 2:30 p.m. in rm. 253. Deft. remanded to custody.
3-11-93	37	Defts' motion for reconsideration and inspection of Automobile.
5-20-93	38	HEARING (RTR). Sentencing: 60 months imprisonment. • • • • SUPERVISED RELEASE 4 yrs. • • • •
5-21-93	39	JUDGEMENT (RTR) in a criminal case. E.O.D. 5/28/93.

5-28-93	[45]	HEARING (RTR) Sentencing. SENT: Ct. 1-63 mos. imprisonment. • • • SUPERVISED RELEASE: 4 yrs with conditions. • • • •
5-28-93	[48]	AMENDED JUDGMENT (RTR) in a criminal case. • • •
6-29-93	44	Transcript of proceedings held on 1-21-93.
6-29-93	45	Transcript of proceedings held on 1-22-93.
6-29-93	46	Transcript of proceedings held on 1-25-93.
6-30-93	47	Transcript of proceedings held on 1-28-93.
6-30-93	48	Transcript of change of plea f/Saul Ornelas held on 3-11-93 which contains court ruling on motion for reconsideration.
2-10-94		DECISION OF SEVENTH CIRCUIT. Vacated and remanded to district court.
3-15-94	58	ORDER by Judge Rudolph T. Randa. Consistent with the 7th Circuit's remand order, the matter shall be referred to Magistrate Bittner for purposes of determining the credibility of Officer Luedke's testimony regarding the loose door panel. (kmf). [Entry date 3/17/94].
3-29-94	59	POST-REMAND RECOMMENDATION by Mag. Judge Robert L. Bittner to the Honorable Rudolph T. Randa concerning Defendants'

		Motions to Suppress. It is RECOMMENDED that the U.S. District Judge enter an order GRANTING deft. Saul Ornelas' motion to suppress and exclude physical evidence. It is FURTHER RECOMMENDED that the U.S. District Judge enter an order GRANTING that aspect of deft. Ismael Ornelas-Ledesma's motion to suppress items seized f/the 1981 Oldsmobile.
4-7-94	60	Government's OBJECTIONS to the Mag. Judge's Post-Remand Recommendation Re: Deft. Motion to Suppress. (kmf) [Entry date 4/12/94].
4-8-94	61	OBJECTIONS to Magistrate Judge's Post-Remand Reconsideration by defendants Saul ORNELAS and Ismael L. ORNELAS.
9-20-94	62	DECISION AND ORDER: (RTR). The Government's objection to the Magistrate recommendation is sustained and the defendants' motions to suppress are denied.
4-18-94		ORDER of the United State [sic] Court of Appeals Filed Circuit Rule 53 order PER CURIUM [sic]. AFFIRMED. Posner, Flaum, Manion. [94-3349, 94-3350].
4-18-94		Terminated on the Merits after Submission Without Oral Hearing; Affirmed, Written, Unsigned, Unpublished, Posner, authoring judge; Flaum, Manion. [94-3349 94-3350].

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAUL ORNELAS and ISMEAL [sic] LEDESMA ORNELAS,

Defendants.

Case No. 92-Cr-243

MAGISTRATE JUDGE'S RECOMMENDATION TO THE HONORABLE RUDOLPH T. RANDA AND ORDER

NATURE OF THE CASE

(Filed Feb. 12, 1993)

On December 15, 1992 a federal grand jury sitting in this District returned a one (1) count indictment against defendants Saul Ornelas (hereinafter referred to as Saul) and Ismeal Ledesma Ornelas (hereinafter referred to as Ismeal), charging them with violating 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 by knowingly and intentionally possessing, with intent to distribute, a mixture containing cocaine.

The defendants appeared before this Court on December 17, 1992 for arraignment, entering pleas of not guilty. Pursuant to the pretrial scheduling order, the defendants filed various pretrial motions which are ready for resolution and will be addressed herein. Previously, the defendants' motions to compel discovery were denied

by this Court's order of January 15, 1993, which was upheld on appeal by Judge Randa.

MOTIONS TO SUPPRESS

Defendants Saul and Ismeal move the Court for issuance of orders suppressing evidence seized on December 11, 1992 from their persons and a 1981 Oldsmobile bearing State of California license plate number 2YOY835, which was parked in front of room 4 of the Suburban Motel, 4600 South 27th Street, Milwaukee, Wisconsin. They contend their Fourth Amendment rights to be free from unreasonable searches and seizures were violated when law enforcement officers subjected them to an investigatory stop, without "reasonable suspicion"; searched the Oldsmobile without their consent and, without probable cause, conducted an intrusive search of the interior of the vehicle's right rear door by removing a plastic vent cover. Both defendants also seek suppression of statements obtained from them while they were in custody at the City of Milwaukee Police Department (hereinafter referred to as MPD) on the grounds such statements were obtained in violation of their *Miranda* rights and were involuntary.

These motions were the subject of an evidentiary hearing conducted by the Court on January 21, 22, and 25, 1993. At the hearing Milwaukee County Deputy Sheriffs (hereinafter referred to as MCDS) Michael Pautz, Lyle Luedke, Gil Pagan, Donald Hurrle, Roger R. Wiggins, and United States Department of Justice, Drug Enforcement Administration (hereinafter referred to as DEA) Special Agent (hereinafter referred to as SA) James Allen

appeared and testified on behalf of the government. A supplemental evidentiary hearing was convened on January 28, 1993 to admit into evidence a Phillips screw which had been removed from the plastic vent cover of the right rear door of the Oldsmobile, and to place upon the record the parties' stipulation that no rust appeared on the screw. Based on the testimony and evidence adduced at such hearings, as well as having considered the briefs and arguments of the parties, this Court makes its findings of fact and proposed dispositions of such motions.

Findings of Fact

On Friday, December 11, 1993 MCSD [sic] plain clothes Detective Michael Pautz, a twenty (20) year veteran who has been assigned to the Drug Enforcement Unit for two (2) year veteran who has been assigned to the Drug Enforcement Unit for two (2) years, was engaged in a routine survey of motels located along South 27th Street, Milwaukee, Wisconsin looking for drug trafficking activity. At the Suburban Motel, 4600 South 27th Street, Milwaukee, Wisconsin, he observed a 1981 two (2) door Oldsmobile automobile with California license plates 2YOY835 parked in front of room 4. Based upon his experience and training in drug interdiction, Pautz knew an older two (2) door GM vehicle is often used to transport drugs and California is a source state for controlled substances; consequently, he contacted his dispatcher to check on the license plate. The dispatcher advised Pautz the vehicle was listed to one Miguel Ornealas of 830 North 16th Street, San Jose, California with an additional name of "Ledesma." However, Pautz was not sure whether the dispatcher indicated the name

"Ledesma" came before or after the name "Ornealas." After speaking with the dispatcher, Pautz spoke with the motel clerk who disclosed, at 4:00 a.m. that morning, an individual named Ismeal Ornelas had checked into room 4 with another individual, without prior reservations, and was due to check out at 11:00 a.m.

Pautz then requested his partner, MCDS plain clothes Detective Donald Hurrle, meet him at the motel. Upon Hurrle's arrival in an unmarked car approximately fifteen (15) to twenty (20) minutes later, Pautz briefed him about the Oldsmobile and the occupants of room 4. Pursuant to Hurrle's suggestion, Pautz contacted the Milwaukee DEA office and asked for a Narcotics and Dangerous Drugs and Information Systems (hereinafter referred to as NADDIS) check on the names Ismeal Ornelas and Miguel Ledesma Ornealas. A short time later, Pautz was advised both names appeared on NADDIS and was given the ~~following~~ information: Miguel Ledesma Ornealas, a/k/a Miguel Ledesma-Lemus, with a date of birth September 29, 1945, 5'6', 150 pounds, Hispanic male was a heroin dealer from El Centro, California; Ismeal Ornelas, Jr., from Tuscon, Arizona was a 1,000 kilogram a month cocaine dealer. Pautz is not familiar with the geography of California and did not know that San Jose and El Centro, California are 600 miles apart. Upon receiving the NADDIS information, Pautz and Hurrle decided to conduct surveillance of room 4 of the Suburban Motel and to summon to the scene MCDS Detective Lyle Luedke, the narcotics dog handler for the Drug Enforcement Unit, because they suspected the Oldsmobile contained drugs.

Shortly after 9:30 a.m. Luedke, in plain clothes, arrived in an unmarked car at the scene, together with

the narcotics detection dog. In the K-Mart parking lot across the street from the Suburban Motel, Detective Hurrle advised Luedke they were conducting surveillance of room 4 of the Suburban Motel which they believed was occupied by a possible drug courier, Ismeal Ornelas, and another individual, whose identity was unknown. He was further advised checkout time for room 4 was 11:00 a.m. and, if time permitted, the exterior of the Oldsmobile should be "sniffed" by the drug detection dog.

Not long after Luedke arrived, Pautz departed the scene; Hurrle and Luedke repositioned themselves on the same side of the street at the Suburban Motel, because heavy traffic had obscured their view from the parking lot, and continued to conduct surveillance of room 4 from their separate cars which were parked approximately 250 yards away. After approximately forty-five (45) minutes, Hurrle observed an individual, later identified as Saul, open the hood of the Oldsmobile, tinker briefly under the hood, and start the ignition. He then returned to the room to pick up luggage and loaded it into the trunk. The other individual, later identified as Ismeal, exited room 4 and assumed a position in the front passenger seat of the Oldsmobile while Saul went briefly into the motel office. Shortly thereafter, Saul returned to the vehicle and positioned himself in the driver's seat.

At this point, the officers drove their separate unmarked vehicles to parking spaces on either sides of the Oldsmobile. However, the position of their cars did not box in the Oldsmobile and prevent it from leaving the scene. Both officers were dressed in plain clothes. Hurrle, who had no visible gun, proceeded to the driver's side of the vehicle and Luedke, who had a gun visible but not

drawn, proceeded to the passenger side. Hurrle identified himself as a law enforcement officer, asked the occupants of the vehicle whether he could speak to them, and inquired whether they were in possession of any illegal drugs or contraband. Both occupants responded, almost simultaneously, they had nothing illegal or anything like that. In response to a request for identification, both Saul and Ismeal produced identifying documents. Luedke reviewed the California driver's license produced by Ismeal, listing Ismeal's residence as Martinez, California. Ismeal responded in the affirmative to Luedke's inquiry whether he had just arrived from California. Luedke did not realize there was a discrepancy between the NADDIS report listing Ismeal Ornelas as being from Tucson, Arizona and the fact the Ismeal before him was apparently from California. The identification documents produced by Saul and Ismeal were retained by the law enforcement officers. At Hurrle's request Saul, the driver, consented to have the officers look inside the vehicle. In fact, Saul opened the trunk of the Oldsmobile with a key and held the trunk lid up to allow Hurrle to search it and the luggage inside. While the trunk was being searched, Saul was very calm and Ismeal was also calm, but shaking.

When Hurrle announced he had completed the search of the trunk, with negative results, Luedke proceeded to the passenger area of the vehicle and checked to see whether the back seat was loose. Upon finding it was not, he examined the right rear quarter panel near the handle. He found this panel to be loose. Based upon his training, Luedke suspected the panel had been removed and contraband was hidden inside. Luedke testified he then observed the vent area of the door, noticing

the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led his to believe the vent cover had recently been removed. Luedke then released the screw, dismantled the vent area of the door, and exposed a cavity approximately five (5) inches high and four (4) inches wide which contained a paper bag in which he felt a hard block. After unsuccessfully attempting to remove the bag through the vent opening, Luedke removed the interior panel of the right rear door, retrieved the paper bag, and told Hurrle he had "found something." Luedke tore open the bag, revealing a block of cocaine wrapped in aluminum foil and tape.

At that point, the defendants were handcuffed, placed under arrest, and placed in separate cars. Sometime after the cocaine was found, Luedke had his dog sniff the Oldsmobile, but no other cocaine was detected. At the scene, Hurrle advised Ismeal of his *Miranda* rights after he was placed in Hurrle's car, although he was not questioned until approximately two (2) hours later at the MPD.

Upon arrival at the MPD, Ismeal was taken to an interrogation room approximately eight (8) by ten (10) feet in size, where he remained in leg irons for approximately an hour. At 1:08 p.m., Pautz again advised Ismeal of his *Miranda* rights and Pautz and Hurrle began to interview Ismeal. Shortly after the commencement of the interview, which was taped, Hurrle stated to Ismeal:

> I want to tell you if you cooperate with us we can make you one promise and one promise only . . . we will speak on your behalf to the Assistant District Attorney of the U. S. Attorney or to the Court if necessary and advise them

> that you cooperated with us, o.k. We cannot at this point tell you that you are not going to jail. We can't tell that you're going to get a lesser sentence because you cooperated with us. All we can tell you is one thing. We will speak on your behalf. We will tell them that you cooperated with us. That could mean a whole lot and more than likely will mean a lot to those people.

Sometime later in the interview, Hurrle told Ismeal "We'll tell the DA or the United States Attorney that you told us something and we found out later that it was a flat out lie and then you don't get in any deals more than likely." During the course of the interview, Ismeal stated he understood his *Miranda* rights, never asked for an attorney, he did not appear to be under the influence of alcohol or drugs, he was cooperative and experienced no difficulty communicating with the officers in English. The interview ended at 1:45 p.m.

At approximately 1:30 p.m. MCDS Gil Pagan, a 4-1/2 year veteran assigned to the Drug Enforcement Unit since September 1991 whose native language is Spanish and has been interpreting in an unofficial capacity for thirty-two years and in an official capacity since August 8, 1988, albeit without any formal training in interpretation, advised Saul of his *Miranda* rights using a standard English advice of rights cards which he translated into Spanish. After Pagan interpreted each right from English into Spanish, Saul stated he would be willing to cooperate.

About 2:00 p.m. Hurrle and Pautz entered the fourteen (14) by ten (10) conference room where Saul and

Pagan had been waiting and the interview of Saul commenced. Pagan acted as interpreter throughout most of the interview; however, there were times during the course of the interview where Saul understood questions posed to him by Hurrle and responded in English without the assistance of Pagan. Saul was advised that the only thing law enforcement officers would do for him, if he decided to cooperate, was to inform the D.A. or the Court of his cooperation, but that they did not guarantee him anything. During the course of the interview, Saul was coherent and fairly calm, although he seemed concerned about his situation. During the course of the interview, the deputies engaged in banter among themselves which was not translated into English by Pagan. Pautz asked, "Do they have courts in Mexico or do they have standard procedures." Hurrle responded "Due process? A wall?" In return, Pagan added, "Seven muskets in front of you?" The interview of Saul during which he made no incriminating statements lasted approximately thirty (30) minutes.

At approximately 2:45 p.m. Luedke reinterviewed Ismeal because he wanted to know how the cocaine got into the right rear quarter panel of the Oldsmobile – information which neither defendant had disclosed during their interviews. At the commencement of the interview, which was conducted in a five (5) by seven (7) foot room containing a desk, two (2) chairs, and an ashtray, Luedke advised Ismeal of his *Miranda* rights by reading verbatim from an advice of rights card. Pautz was present during the interview. No threats or promises were made to Ismeal and he was allowed to smoke. His demeanor was very solemn. Throughout the interview, he stated he

understood his rights and proceeded to make a statement that Saul had placed the cocaine in the cavity of the right rear quarter panel door.

At the hearing MCDS Sergeant Roger R. Wiggins, a twenty (20) year veteran who has been second-shift supervisor of the Communications Bureau for four (4) years, testified his bureau routinely runs Department of Motor Vehicle computer checks using state license plate numbers to obtain the owner's name, residence, and the make of car to which the license is listed. He stated additional information can be obtained by making an administrative request. On January 19, 1993 Wiggins made a license check and an administrative inquiry on the Oldsmobile. The initial request revealed the vehicle belonged to "Ornelas Miguel Ledesma" of San Jose, California. The administrative request showed the owner of the vehicle to be Miguel Ornelas, also known as "Ledesma Miguel Ornelas"; an updated San Jose, California street address; the owner's sex; date of birth; height; weight; hair color; and eye color.

Officer Pagan reviewed the administrative request and stated the alternative name listed for Miguel Ornelas was for a person named "Miguel Ornelas-Ledesma." He further testified the majority of Hispanics use their father's name first and then their mother's name.

Analysis

Although the government initially disputed the defendants' expectation of privacy in the Oldsmobile, during the course of the evidentiary hearing, it conceded both defendants had the requisite expectation of privacy

to allow them to assert that their Fourth Amendment rights had been violated by the search of the vehicle. Consequently, the threshold issue in this case is whether the defendants were subjected to a seizure by law enforcement officers. The law is well established that an encounter between a law enforcement officer and a citizen implicates the Fourth Amendment only if the officer seizes the citizen. *United States v. Mendenhall*, 446 U.S. 544, 555 (1980); *Terry v. Ohio*, 391 U.S. 1, 19 (1968). If a seizure does not occur; and therefore, the encounter is consensual in nature (limited to questioning about an individual's identity and requesting identification), then police do not need justification for this contact. *INS v. Delgado*, 466 U.S. 210, 216-17 (1984); *United States v. Dyer*, 784 F.2d 812, 815-16 (7th Cir. 1976); *United States v. Borys*, 766 F.2d 304, 310-11 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). The test for determining whether a police-citizen contact rises to the level of a Fourth Amendment seizure is an objective one. *United States v. Espinosa-Alvarez*, 839 F.2d 1201, 1205 (7th Cir. 1988); *United States v. Pavelski*, 789 F.2d 485 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 322 (1986). This formulation is whether, based on the totality of circumstances, a reasonable person would believe his freedom of movement is restrained or believes he is at liberty to disregard a police officer's request for information. If the latter, then a seizure has not occurred. *United States v. Espinosa-Alvarez*, 839 F.2d at 1205.

In order to assess the reasonableness of the seizure, this Court must weigh the circumstances on the Fourth Amendment "scale" for police/citizen encounters. *See United States v. Chaidez*, 919 F.2d 1193, 1197 (7th Cir. 1990).

"[A] person has been 'seized' within the meaning of the Fourth Amendment. . . . only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (citations omitted). Recently the Court of Appeals for this Circuit summarized the three (3) categories for police/citizen encounters in relation to the Fourth Amendment as follows:

> The first category is an arrest, for which the Fourth Amendment requires that police have probable cause to believe a person has committed or is committing a crime. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The second category is an investigatory stop, which is limited to a brief, non-intrusive detention. This is also a Fourth Amendment "seizure", but the officer need only have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82, 95 S.Ct. 2574, 2580-81, 45 L.Ed.2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 2868, 20 L.Ed.2d 889 (1968). The third category involves no restraint on the citizen's liberty, and is characterized by an officer seeking the citizen's voluntary cooperation through non-coercive questioning. This is not a seizure within the meaning of the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. 544, 553-55, 100 S.Ct. 1870, 1876-77, 64 L.Ed.2d 497 (1980); *Terry*, 392 U.S. at 19, n.16, 88 S.Ct. at 1879, n.16.

United States v. Johnson, 910 F.2d 1506, 1508 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 764 (1991). *See also*,

United States v. Adebayo, No. 91-2138, slip op. at 8 (7th Cir. Feb. 5, 1993).

"So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." *United States v. Williams*, 945 F.2d 192, 195 (7th Cir. 1991). "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Withers*, 972 F.2d 837, 841 (7th Cir. 1992) (citations omitted).

The distinction between a consensual encounter and a stop is one of degree. Relevant factors include whether the encounter occurred in a public or private place, whether the suspect consented or refused to talk to the police, whether the police informed the suspect that he was not under arrest and was free to leave, whether the police removed the suspect to another area, whether the suspect felt capable of refusing to consent to the search, and whether the suspect eventually departs the area without hindrance. *See United States v. Withers*, 972 F.2d at 842. Other factors in this determination include: "The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or the tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Withers*, 972 F.2d at 842 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55 ([1980]). Additionally, the "lengthy" retention of documents, such as identification and airline tickets, is

a factor in determining whether a stop has occurred. *See United States v. Withers*, 972 F.2d at 842.

Here, the encounter between the law enforcement officers and the occupants of the 1981 Oldsmobile was initially a *Terry* stop. Within moments of the encounter, Hurrle was in possession of their identification documents, questioning them as to whether they had drugs in the car, and requesting permission to search the vehicle. The defendants were never told they were not under arrest or that they were free to leave. At the time they approached the defendants, the law enforcement officers had knowledge of "specific and articulable facts which, when taken together with the rational inferences from those facts", could reasonably cause them to conclude, in light of their experiences, that criminal activity was afoot. *Terry v. Ohio*, 392 U.S. 1, 21 & 30 (1968). Pautz specifically testified it had been his experience that vehicles similar to the Oldsmobile are used to transport narcotics. In addition, Pautz learned the registered owner of the vehicle was from a source state, the owner's name came back on NADDIS as being a drug trafficker, and the name of Ismeal Ornelas, Jr. came back on NADDIS as also being a drug trafficker. An additional factor contributing to the reasonable suspicion of drug trafficking was the defendants' 4:00 a.m. check-in to the motel. Consequently, this Court concludes the defendants were subjected to an investigatory detention, based on reasonable suspicion, and the seven (7) to ten (10) minute detention until the cocaine was discovered was reasonable. *See Piska v. City of Stevens Point, Wis.*, 823 F.2d 1168, 1176 (7th Cir. 1987) (ten [10] minute stop reasonable); *United States v. Davies*, 768 F.2d 893, 902 (7th Cir.), *cert. denied*, 474 U.S. 1008

(1985) (forty-five [45] minute stop reasonable); *United States v. Kapperman*, 764 F.2d 786, 792 (11th Cir. 1985) (ten [10] minute stop reasonable).

The next question to be addressed is whether the Fourth Amendment was violated by the law enforcement officers' search of the Oldsmobile. The Fourth Amendment permits law enforcement officers to conduct a warrantless search, without probable cause, if an authorized individual voluntarily consents to the search. *Florida v. Jimeno*, ___ U.S. ___, 111 S.Ct. 1801, 1803 (1991); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The burden is upon the government to demonstrate, by a preponderance of the evidence under the totality of the circumstances, that consent is freely and voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. at 222-27.

The record before the Court clearly establishes consent to search the Oldsmobile. Saul indicated the law enforcement officers could search the vehicle and neither defendant placed any restrictions on the areas the officers could search or, in the course of the search, asked them to stop. However, under *United States v. Garcia*, 897 F.2d 1413, 1419-20 (7th Cir. 1990), police may not dismantle parts of a car body to search for hidden compartments when they have merely obtained permission to "look in the car" for illegal drugs. Unless the police have probable cause to believe the car contains drugs concealed in hidden compartments, the opening of door panels is "inherently invasive and extends beyond consent given." *United States v. Garcia*, 897 F.2d at 1420. Here, Luedke's clear testimony was that rust within the groove of the head of the Phillips screw holding the plastic vent cover in place caused him to believe it had been removed and drugs

were concealed within the door panel. But, the screw itself belies this testimony. The record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband. Consequently, the Court finds there was not probable cause to dismantle the panel.

Even though the search was beyond the scope of the consent and was not justified by independent probable cause, the cocaine found will not be suppressed as evidence under the inevitable discovery exception to the Fourth Amendment exclusionary rule of *Nix v. Williams*, 467 U.S. 431, 433 (1984), which holds if the prosecution can establish by a preponderance of evidence that the evidence ultimately or inevitably would have been discovered by lawful means, even if no violation of *any* constitutional provision had taken place, then the evidence should be received. The stated rationale for the doctrine is that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position, than they would have been if no police error or misconduct had occurred in those circumstances where evidence would have been discovered independent of a constitutional violation. *Nix v. Williams*, 467 U.S. at 444. The court further stated that, under this doctrine, the prosecution is not required to prove the absence of bad faith as such a requirement would result in withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. *Nix v. Williams*, 467 U.S. at 445.

This Court finds, by a preponderance of the evidence, that regardless of the government's good or bad faith, the cocaine would have inevitably been discovered any way. This Court bases its conclusion upon the inevitability of a canine sniff of the Oldsmobile which does not compromise any legitimate interest in privacy and, therefore, is not a Fourth Amendment search. *See United States v. Vasquez*, 909 F.2d 235, 238 (7th Cir. 1990) (citing cases). Luedke's trained drug detection dog was waiting at the scene in his vehicle. Clearly, the defendants would not be allowed to depart from the Suburban Motel without their vehicle being "sniffed" if cocaine was not otherwise discovered. *See United States v. Buchanan*, 910 F.2d 1571 (7th Cir. 1990).

The final issue to be addressed is the admissibility of the statements obtained from Saul and Ismeal. The government has indicated it does not intend to introduce into evidence any statements made by Saul as a part of its case in chief. Thus, the sole issue as to Saul is the voluntariness of his statements under *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), in the event the government intends to introduce his statement for impeachment purposes.

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), the United States Supreme Court detailed the factors to be considered when evaluating whether a defendant's "will was overborne" in the giving of statements:

> [T]he Court has assessed the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account include the youth of the accused, his

> lack of education, or his low intelligence, the lack of any advise to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the use of physical punishment such as the deprivation of food or sleep.

(Citations omitted.) Although Hurrle told Saul he would bring any cooperation on his part of the attention of prosecutors and/or the Court, there is no prohibition on the buying of information with honest promises of consideration. *See United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 203 (1990). The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they are just not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible. *See United States v. Rutledge*, 900 F.2d at 1130 (7th Cir.); *United States v. Harris*, 914 F.2d 927, 933 (7th Cir. 1990). There is no evidence the statement obtained from Saul was the result of his will being overborne. Thus, there is no basis for suppression of the statements of Saul.

Nor is there any basis for suppression of the statements obtained from Ismeal. Ismeal was advised of his constitutional rights, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and made a knowing and intelligent waiver of those rights as required by *Moran v. Turbine*, 475 U.S. 412 (1986). The record does not disclose that the statements which Ismeal seeks to suppress were obtained by overbearing his will. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

In this case, Ismeal made a knowing and intelligent decision to cooperate with law enforcement authorities and to provide them with certain information. Although Ismeal was told that any cooperation on his part would be brought to the attention of prosecutors and/or the Court, there is no evidence this representation overbore his free will. Since *Miranda* and its progeny are designed to protect criminal defendants from coercive police tactics which would produce involuntary confessions, they afford no protections to criminal defendants who, of their own volition, decide to make statements and otherwise cooperate with authorities.

In sum, this Court concludes no Fourth Amendment violation occurred when law enforcement officers stopped Saul and Ismeal. Furthermore, although the search of the Oldsmobile exceeded the scope of the consensual search, the cocaine would have been inevitably discovered and, therefore, is not subject to suppression. Finally, Ismeal's statements were not obtained in violation of his constitutional rights and Saul's statement was voluntary. Accordingly, this Court will recommend the defendants' motions to suppress evidence and statements be denied.

SAUL'S MOTION FOR SEVERANCE

Saul moves the Court for issuance of an order, pursuant to Fed. R. Crim. P. 14, severing his trial from that of Ismeal relying upon *Bruton v. United States*, 391 U.S. 123 (1968) which holds admission of a codefendant's confession at a joint trial where the codefendant does not testify and, therefore, cannot be cross-examined, violates a

defendant's Sixth Amendment right to confrontation. In the alternative, Saul seeks dismissal of the indictment.

In response the government indicates it has concluded it is not possible to redact Ismeal's confession to delete reference to Saul in a manner which does not still clearly implicate Saul. Consequently, the government concedes severance of the defendants' trials is necessary. Accordingly, Saul's motion for severance will be granted.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Saul Ornelas' motion to suppress and exclude physical evidence;

IT IS FURTHER RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Saul Ornelas' motion to suppress statements;

IT IS ALSO RECOMMEDED that the United States District Judge enter an order **DENYING** defendant Ismeal Ledesma Ornelas' motion to suppress seizure of items from the 1981 Oldsmobile and the statements of the defendant; and,

IT IS ORDERED that defendant Saul Ornelas' motion for severance be and hereby is **DENIED.**

Written objections to the foregoing recommendations and orders may be filed in duplicate with the Clerk of Court on or before February 19, 1993 at 8:30 a.m. Failure to file a timely objection shall result in a waiver to your right to appeal.

Dated at Milwaukee, Wisconsin this 12th day of February, 1993.

BY THE COURT:

/s/ Robert L. Bittner
ROBERT L. BITTNER
United States Magistrate
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

-vs- Case No. 92-CR-243

ISMEAL ORNELAS LEDESMA and
SAUL ORNELAS,
Defendants.

DECISION AND ORDER

(MAR - 9 1993)

This matter comes before the Court on objections filed by the defendants, Ismeal Ornelas Ledesma ("Ismeal") and Saul Ornelas ("Saul"), to the Recommendations issued by Magistrate Judge Robert L. Bittner denying defendants' motion to suppress certain statements and physical evidence. For the following reasons, defendants' objections are overruled and the Magistrate's Recommendation is affirmed, although the Recommendation as to the suppression of physical evidence is affirmed on grounds somewhat different than these expressed by Magistrate Bittner.

Magistrate Bittner's Recommendation thoroughly explains the nature of the case and his corresponding findings of fact, which the Court incorporates here by this reference. In the interests of brevity, and having read the parties' initial briefs before the Magistrate and subsequent written objections, the Court summarily affirms the Magistrate's recommendations regarding (1) the finding

of reasonable suspicion for a *Terry*-stop; (2) the finding of consent for the vehicle search; and (3) the denial of both defendants' motions to suppress their post-arrest statements. With respect to the foregoing issues the Court simply adopts the reasoning contained in Magistrate Bittner's Recommendation, along with the factual findings he relied upon in reaching those conclusions.[1] Thus, the only question remaining is whether the cocaine seized

---

[1] With one exception (the question whether Officer Luedke's gun was visible as he approached the defendants' vehicle – the parties agree that it was not), none of the parties attack the basic accuracy of the facts as found by Magistrate Bittner, although both defendants dispute the legal conclusions reached by the Magistrate based on those facts. For example, defendant Ismeal points to several facts which he feels are important to the issues but which the Magistrate did not address, and also disputes the Magistrates's characterizations of some of the underlying testimony and evidence. (Ismeal's Objection at 2-10.) Defendant Saul does the same, particularly with respect to the decision on the motion to suppress his post-arrest statements. (Saul Objection at 4-5), and then simply incorporates the arguments and facts contained in his initial briefing, which are essentially the same facts and characterizations of testimony stressed by Ismeal in his objection. (Saul Objection at 2.) The Court has taken into consideration the additional facts and differing characterizations raised by the defendants in these documents and finds that, even if true, they do not affect the Court's decision to affirm Magistrate Bittner's Recommendation on the three issues referenced above. The Court therefore adopts the Magistrate's factual findings as its own, with the exception of his finding that Officer Luedke's gun was "visible but not drawn" as he approached the defendants' vehicle. (Magistrate Recommendation at 5-6.) The Court, having read the objections of record and the transcript of Officer Luedke's testimony, hereby finds that Officer Luedke's gun was not visible as he approached the defendants' vehicle.

from the defendants' vehicle must be suppressed as the result of an invalid search.

I. SUPPRESSION OF PHYSICAL EVIDENCE.

Magistrate Bittner found that removing the door panel to find the cocaine at issue was a search that went outside the scope of the defendants' initial consent to search the vehicle, and further that the search could not be justified on grounds of probable cause. (Magistrate Recommendation at 15.) The Magistrate nonetheless denied the motions to suppress on grounds of inevitable discovery, finding that the police had a sniffer dog present at the scene which would have been used by the officers to find the cocaine if their own search proved unsuccessful. (Id. at 16.) The Court does not reject the Magistrate's holding regarding inevitable discovery[2], but

---

[2] Under the doctrine of inevitable discovery, evidence obtained by unlawful means will not be excluded if the prosecution can establish, by a preponderance of the evidence, that the same information inevitably would have been discovered by alternate lawful means which the police were actively pursuing prior to the misconduct. *See generally, Nix v. Williams*, 467 U.S. 431 (1984). Here, the Magistrate found, and this Court concurs, that the officers had summoned a sniffer dog and dog handler to the scene prior to the search, and that the officers would have used the dog if the search had not proved successful. (Magistrate Recommendation at 16-17.) The Magistrate also found that a canine sniff would have found the cocaine at issue. (Id.) The defendants now object to this latter finding, arguing that there was no evidence submitted during the suppression hearing regarding the reliability of canine sniffs in general, or of sniffs by this dog in particular. (Saul's Objection at 2-3; Ismeal's Objection at 15-16.) The Magistrate apparently did not consider this question, perhaps because neither defendant raised the issue in their post-hearing briefs, or perhaps because both defendants' briefs seemed to admit the same by stating that "[d]ogs have been trained to sniff the exterior of cars and do react or alert to cocaine hidden in car bodies and in trunks." (See Saul's Brief at 19; Ismeal's Brief at 25-26.)

finds that holding unnecessary in view of the Court's belief that the facts found by Magistrate Bittner establish probable cause to remove the door panel at issue and search the compartment behind it.

The United States Supreme Court has cautioned lower courts not to become too technical or mechanical in their probable cause determinations:

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. . . . "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same – and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

Texas v. Brown, 460 U.S. 730, 742 (1983). (Citations omitted.)

The Seventh Circuit requires the same flexibility. "Probable cause exists if the facts and circumstances within [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an item subject to seizure will be found in the place to be searched." *United States v. Garza-Hernandez*, 623 F.2d 496, 499 (7th Cir. 1980). "Probable cause is thus more than bare suspicion, but less than virtual certainty." *Id.* "As the term itself implies, probable cause exists if the probability is that the thing sought is in the place to be searched; probabilities are to be assessed in the light of practical experience and the practical inferences to be drawn from known or reliable facts." *Id.* "Government agents are entitled to reasonably rely on their special knowledge and expertise in assessing probabilities and drawing inferences." *Id.*

In cases involving a vehicle search, "[p]robable cause . . . exists when the facts and circumstances would lead a reasonably prudent person to believe that the vehicle contains contraband." *United States v. Strickland*, 902 F.2d 937, 942 (11th Cir. 1990). "The facts and circumstances upon which a finding of probable cause is based include "the sum total . . . and the synthesis of what the police have heard, what they know, and what they observe as trained officers." *Id.*, at 942-43. Moreover, in cases involving a *Terry*-stop based upon reasonable suspicion, information gathered after the stop may be added to information gathered before the stop for purposes of determining whether there is probable cause, and as such

the reasonable suspicion relied upon in making the stop may ripen into probable cause to search. *See generally, United States v. Van Lewis*, 409 F. Supp. 535, 542 (E.D. Mich. 1976); *United States v. Avalos-Ochoa*, 557 F.2d 1299, 1303 (9th Cir. 1977).

The Magistrate's decision on the probable cause issue focused upon the accuracy of one fact, *i.e.*, whether Officer Luedke was correct in his belief that a screw attaching the air vent to the door panel was rusted, giving rise to his belief that the panel had been recently removed. After the screw was produced and the parties stipulated to the fact that it was not rusted, the Magistrate ruled that there was no probable cause to search because "[t]he record disclose[d] no evidence from which Luedke could conclude that a hidden panel contained contraband." (Magistrate Recommendation at 15.)

The Magistrate's ruling would appear to run contrary to his own factual findings, and in any event does not consider the totality of the circumstances leading up to the removal and search of the door panel. The defendants and their car were singled out during a routine survey of motels conducted for the express purpose of looking for drug trafficking activity. (Magistrate Recommendation at 3.) The vehicle involved was a 1981 two (2) door Oldsmobile, an older GM model which is often used by drug traffickers to conceal contraband. (Id.) The car had California license plates, and its owner was listed as residing in California, a source state for controlled substances. (Id.) There were two individuals travelling together in the car, and they had checked into the motel at four o'clock in the morning, without reservations. (Id.) By itself this "drug courier profile", as the defendants call it, may not

constitute reasonable suspicion or probable cause. But then two NADDIS checks were run on the names of the car owner and the individual listed in the motel's registry, and both names turned up hits on known drug dealers.[3] (Id. at 4.) These hits, combined with the drug courier profile, clearly gave rise to a reasonable suspicion that drug trafficking activity was afoot and that the vehicle contained contraband of some kind. This reasonable suspicion became probable cause when Officer Luedke found that the right rear door panel of the car was loose, leading him to suspect that the panel had been removed and that contraband was hidden inside. (Id. at 6-7; Transcript of Off. Luedke's Testimony at 15-16.)

---

[3] Much has been made of the fact that there appeared to be some minor discrepancies between the names and addresses of the individuals who turned up on the NADDIS check, and the names which the officers had actually obtained during their investigation. For instance, the name on the motel registry was "Ismeal Ornelas", and Ismeal's drivers license, which he produced prior to the search, indicated that he lived in California. The NADDIS hit, however, was for an individual named "Ismeal Ornelas, Jr.", who was listed as being a resident of Arizona. Similarly, defendants allege that the proper Hispanic translation of the name given to the officer as the owner of the vehicle was Miguel Ornelas-Ledesma, whose residence was listed as San Jose, California. The NADDIS hit was for a Miguel Ledesma-Ornelas, whose residence was listed as El Centro, California. Focusing on these discrepancies as a basis for defeating probable cause introduces requirements of certainty and absolute correctness into the analysis that were expressly proscribed by the Supreme Court in *Texas v. Brown*. It also ignores the fact that drug traffickers may be highly mobile, that the names at issue are virtually identical, that the names are associated with individuals fitting a drug courier profile, and that the names are further associated with a vehicle containing a loose door panel.

Thus, considering the totality of the circumstances, including the drug courier profile, the two NADDIS hits, and the lose door panel, this Court finds that an officer of reasonable caution would be justified in the belief that contraband would be found behind the right rear door panel.[4] This conclusion is further supported by decisions from the Seventh Circuit finding that the amount of probable cause necessary for the police to do something, such as conduct a search, "depends on how deeply they invade the zone of privacy", *United States v. Concepcion*, 942 F.2d 1170, 1173 (7th Cir. 1991), and that "the reasonable expectation of privacy that persons may have in their autos is usually of a lesser magnitude than privacy expectations that inhere in other types of property." *Garza-Hernandez*, 623 F.2d at 500. Given this lower expectation of privacy, and the confluence of the above facts and circumstances, the officers clearly had probable cause to remove the door panel.[5]

---

[4] The fact that the screw holding the air vent to the door panel was not rusted, as Officer Luedke had testified, does not destroy probable cause. According to his own testimony, Luedke already had reason to believe the panel had been removed, and contraband hidden inside, by virtue of the fact that the panel was loose. (Luedke Transcript at 15-16; Magistrate Recommendation at 6-7.)

[5] Of course, the above analysis only resolves the probable cause issue, which is only half of the analysis under the Fourth Amendment. Even with probable cause, officers must first obtain a warrant to search, unless the circumstances fall within one of the exceptions to the warrant requirement. Here, the exception is obvious, *i.e.*, the "automobile exception". The "automobile exception" allows the warrantless search of a vehicle where probable cause exists to believe that the vehicle contains contraband or evidence of criminal activity. *United States v.*

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The defendants' objections to the Magistrate's Recommendation are overruled, and the defendants' motions to suppress certain post-arrest statements and physical evidence are denied; and

2. No objection being taken to the Magistrate's Order granting Defendant Saul Ornelas' motion for severance[6], the same is affirmed.

Dated at Milwaukee, Wisconsin, this 9th day of March, 1993.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

McGuire, 957 F.2d 310, 314 (7th Cir. 1992). The exception is justified by the vehicle's ready mobility and the lesser expectation of privacy people have in their automobiles. *United States v. Gallman*, 907 F.2d 639, 641 (7th Cir. 1990).

[6] As Defendant Saul Ornelas correctly points out, the Magistrate's Order contains a typographical error on the last page, which states that the defendant's motion for severance was "denied" rather than "granted". The analysis contained on the page preceding the type makes it clear that Magistrate Bittner was granting the motion, not denying it, and that the statement on the following page was in error.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

Case #92-CR-243

VS.

ISMAEL ORNELAS LEDESMA, and
SAUL ORNELAS,
Defendants.

MOTION FOR RECONSIDERATION AND INSPECTION OF AUTOMOBILE

(Filed Mar. 11, 1993)

This court in its Decision and Order of March 9, 1993, received at the Law Offices of Brian Gleason on March 11, 1993 makes a determination that there existed probable cause to believe that drugs were hidden inside the car's body on the basis of testimony on the part of detective Luedke that the, "right rear door panel of the car was loose, leading him to suspect that the panel had been removed and that contraband was hidden inside."

Luedke's testimony, at 16, was as follows:-

> Q.- What, if anything, did you discover when you were physically inspecting the inside panel?
>
> A.- I discovered that a portion of that panel approximately ten inches by six inches appeared to be or didn't appear but physically felt like it was somewhat loose.
>
> Q.- Based upon your training and experience, what if anything did that mean to you?
>
> . . . .

A.– I considered it was a possibility that that panel had been removed and there could be something concealed in that area.

The magistrate's finding of fact at 6, states in relevant part, "[H]e examined the right rear quarter panel near the handle. He found this panel to be loose. Based upon his training, Luedke suspected the panel had been removed and contraband was hidden inside. Luedke testified he then observed the vent area of the door, noticing the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led him to believe the vent cover had been removed."

It is clear that in this portion of the opinion the magistrate is merely reciting the testimony, not adopting the testimony as a clear finding. We know this because in his "Analysis" section, beginning at page 10, the magistrate sifts through the testimony and attaches credibility determinations.

As to the testimony of Luedke, concerning the rusty screw head, the magistrate states at 15, "Here, Luedke's clear testimony was that rust within the groove of the head of the Phillips screw holding the plastic vent cover in place caused him to believe it had been removed and drugs were concealed within the door panel. But, the screw itself belies this testimony. The record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband. Consequently, the Court finds there was not probable cause to dismantle the panel."

The magistrate earlier referenced the testimony about the door panel being loose, and later makes a finding that

there was "no evidence from which Luedke could conclude . . . " It is obvious that the magistrate similarly made a credibility determination concerning Luedke's testimony about the panel being, "somewhat loose." Tr. at 16.

Prior to the magistrate's decision and after the "rusty screw being produced in court, on February 5, 1993 attorney Robert LeBell, counsel for Saul Ornelas was finally permitted access to the car. The government had canceled an earlier request. As stated in Ismael Ormelas Ledesma's Brief in Support of Motion to Suppress Statements and Items Seized from the Automobile, dated February 6, 1993, Mr. LeBell "was able to examine the car's interior, the area in question felt the same as the equivalent area on the driver's side and felt no different that he would expect it to feel given the composition of the material.

"If the government asserts that probable cause exists to search the interior of the car's body based on this earlier testimony of detective Luedke, this counsel would request the government produce the car in the Marshal's garage, which is a part of the federal court house, for the purpose of the magistrate judge and/or his law clerk personally inspecting the alleged "loose" area and again making a record of the findings."

The government's brief of February 9, 1993, at 11, makes the argument that the panel was loose and "this was sufficient probable cause to allow the officer to remove the vent cover to look inside the area."

The magistrate was faced by testimony of Luedke concerning the rusty screw which he knew to be a lie and counsel's assertions that the panel not being loose and an invitation to bring the car to the courthouse. His

credibility determination that "The record discloses no evidence from which Luedke could conclude that a hidden panel contains contraband" has now been rejected by this court.

Given that this court determination that the reasonable suspicion outlined by the alleged drug courier profile only ripened into probable cause to search the interior of car's body by virtue of adopting Luedke's testimony that the panel in question was in fact "loose," both counsel would move that the auto in question be brought to the Marshal's garage and that this court or his law clerk and all parties jointly inspect the car to make a record as to the panel.

All parties had done a similar inspection in the magistrate's chambers concerning the screw, which dramatically changed the court's opinion concerning the detective's credibility. Given Mr. LeBell's assertion concerning his earlier inspection, the interests of justice require such a joint examination for the purpose of establishing a firm record on this critical fact.

Dated at Milwaukee, WI this 11th day of March, 1993.

/s/ Robert G. LeBell
Robert G. LeBell, Counsel for Saul Ornelas
250 E. Wisconsin Ave. Suite 1900
Milwaukee, WI 53203
414-276-1233

/s/ Brian W. Gleason
Brian W. Gleason, Counsel for
Ismael Ornelas Ledesma
230 W. Wells St. Suite 702
Milwaukee, WI 53203
414-277-5076

Docket # 48-Transcript of 3-11-93, pages 2-5, Eastern District of Wisconsin.

Title omitted in printing.

TRANSCRIPT OF PROCEEDINGS

[2] THE CLERK: Case No. 92-CR-243, United States versus Saul Ornelas. Called for a change of plea. May I have the appearances, please?

MS. FLEMING: Good afternoon, Your Honor. Penelope Fleming, Assistant United States Attorney, appearing on behalf of the Government. Also seated at counsel table is Lisa Cichocki from Probation and Parole.

MR. LEBELL: Good afternoon, Judge. Attorney Robert LeBell appearing on behalf of Saul Ornelas, and also Connie Ward is here as a translator.

THE COURT: Okay. We will swear the interpreter.

(Whereupon the Interpreter, Connie Ward, was sworn in.)

THE COURT: Okay. This case is here as is the case of the co-defendant after this case, at 3 o'clock, for purposes of taking of a plea pursuant to Plea Agreement reached before the Court came out; however, it was served and I take it the Government was served with a motion for reconsideration. It's titled Motion for Reconsideration and Inspection of Automobile. Has the Government been served?

MS. FLEMING: Your Honor, I have – I received a copy a few minutes ago.

THE COURT: All right. And the motion request [3] that the court reconsider what it decided in the review de novo, review of the Magistrate's decision relative to a variety of motions that were filed and heard prior to their appearance and the Court summarily affirmed the Magistrate's recommendations relative to the finding of reasonable suspicion for a temporary stop, the finding of consent for the vehicle search, the denial of Defendant's motion to suppress or post arrest statement, and the question upon which the reconsideration is based is the one involving whether the cocaine seized from the Defendant's vehicle would or should have been suppressed as a resuit of invalid search.

The Court conducted its analysis and in that analysis did not reject the Magistrate's holding regarding the fact that, through the doctrine of inevitable discovery, that the cocaine in question – that which was seized – would have been discovered in any event, but went on to find that based on the totality of the circumstances and its reasoning outlined in its decision, that the search could be validated and was validated on other considerations.

Motion for reconsideration is one which highlights the fact that the – this Court in its de novo review relied upon the testimony of Officer Luedtke who said at one point that he felt – physically felt a loose panel. And that the argument is that Judge Bittner in ruling on officer Luedtke's testimony found that there was nothing in the [4] records – and this was at page fifteen of Magistrate Bittner's ruling and page five of the Court's ruling – where the Magistrate said that there was no probable cause to search because "the records disclosed no evidence from which Luedtke could conclude that a hidden

panel contained contraband." The Court is asked that its decision based upon Luedtke's testimony and factoring that into the totality of the circumstances is one which should be reversed because it disregards Magistrate Bittner's findings. The Court doesn't deem it to be that. The the Court finds that it can and did rely upon what Officer Luedtke stated. The fact that there has been a request in this motion for reconsideration for an inspection of the automobile by the Court and counsels – Mr. LeBell having done so and found that his inspection disclosed that there wasn't the loose panel, or that none of the panels – or that the particular panel, the specific panel, that was testified to by Officer Luedtke as being loose was not loose and not apparently somewhat loose upon being physically felt. That examination the Court finds is not necessary because regardless of what the Court would find at the – any subsequent inspection, the fact of the matter is that the records reviewed by the Court and testimony of Officer Luedtke is one which discloses that in his estimation and his opinion and by his calculation and his view and his belief when – as he testified he felt the panel or observed the panel and engaged the panel, that it appeared, [5] quote, to be – or didn't appear but physically felt like it was somewhat loose, close quote.

In addition, – so the Court's not going to reconsider its judgment. It's put that on the record as an explanation as to why, one, but two, the Court in its decision and order indicated that it was sustaining as it indicated on page three of its decision and order – that it does not reject the Magistrate's holding regarding the inevitable discovery but finds that holding unnecessary in view of the Court's belief as just indicated. And the Court in a

footnote to that decision I think explains thoroughly and carefully the reason why it's not going to disturb that. That fact that that holding – the fact that the Court found it unnecessary in view of its other decision certainly finds that there is a basis for this case to proceed at this juncture on the guilty pleas. So for those reasons we will proceed to the taking of the guilty pleas.

Now, in that connection, the Court has a Plea Agreement which was signed by Mr. Ornelas, Mr. LeBell, Mr. Fryatt, the U.S. Attorney, and Miss Fleming. And the Court will have Mr. Ornelas sworn at this time. Mr. Ornelas, would you please raise your right hand?

THE DEFENDANT: Yes.

SAUL ORNELAS, having been first duly sworn, on oath testified as follows:

THE COURT: Now, Mr. Ornelas, you have been

• • •

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

(Filed May 21, 1993)

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
vs.	(For Offenses Committed On or After November 1, 1987)
ISMAEL ORNELAS-LEDESMA	Case Number: 92-CR-243 Brian W. Gleason Defendant's Attorney
	Penelope C. Fleming Assistant U.S. Attorney

THE DEFENDANT:

[x] pleaded guilty to count one

[ ] was found guilty on count(s) _ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1) 18 U.S.C. § 2	possession with intent to distribute cocaine	December 11, 1992	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count _ is dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 50.00 for count One which shall be due [ ] immediately [x] as follows: prior to the expiration of this sentence

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
612-46-6929 & 564-77-1676

Defendant's Date of Birth:
October 14, 1968

Defendant's Mailing Address:

Racine County Jail
717 Wisconsin Avenue
Racine, WI 53403

Defendant's Residence Address:

May 20, 1993
Date of Imposition of Sentence

/s/ Rudolph T. Randa
Signature of Judicial Officer

Hon. Rudolph T. Randa
U.S. District Judge
Name & Title of Judicial Officer

5/21/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant serve his sentence at a facility near San Jose, California

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ____ a.m. p.m. on _____
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on ____ to _____ at _____, with a certified copy this judgment.

_____
United States Marshal

By _____
Deputy Marshal

* * *

_____

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

(Filed Jun. 11, 1993)

UNITED STATES OF AMERICA

vs.

SAUL ORNELAS

AMENDED

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 92-CR-243

Robert G. LeBell
Defendant's Attorney

Penelope C. Fleming
Assistant U.S. Attorney

THE DEFENDANT:

[x] pleaded guilty to count one

[ ] was found guilty on count(s) _ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1) 18 U.S.C. § 2	possession with intent to distribute cocaine	December 11, 1992	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count _ is dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 50.00 for count One which shall be due [ ] immediately [x] as follows: prior to the expiration of this sentence

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 393-02-2916

Defendant's Date of Birth: June 28, 1968

Defendant's Mailing Address:

Defendant's Residence Address:

44124 Begonia Street
Lancaster, California

May 28, 1993
Date of Imposition of Sentence

/s/ Rudolph T. Randa
Signature of Judicial Officer

Hon. Rudolph T. Randa
U.S. District Judge
Name & Title of Judicial Officer

6/11/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prison to be imprisoned for a term of 63 months.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant serve his sentence at Lompoc, California

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ a.m. p.m. on _____
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on ____ to _____ at _____, with a certified copy this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[x] The defendant shall not possess a firearm or destructive device.

[x] Pursuant to the Anti-Drug Abuse Act of 1988, the defendant shall not illegally possess any controlled substance. Such possession will result in revocation of the supervised release term and the defendant shall serve one-third of the term of supervised release in prison.

[x] The defendant is to cooperate with the Immigration and Naturalization Service at the direction of the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

* * *

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: 1

Imprisonment Range: 51 to 63 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 12,500.00 to $ 1,000,000.00

[x] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[x] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reasons:

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ismael ORNELAS-LEDESMA and Saul Ornelas,
Defendants-Appellants.

Nos. 93-2356, 93-2405.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 10, 1993.

Decided Feb. 10, 1994.

Before POSNER, Chief Judge, and FLAUM and MANION, Circuit Judges.

POSNER, Chief Judge.

Ismael Ornelas-Ledesma and Saul Ornelas were convicted of illegal possession of a controlled substance with intent to distribute it and were sentenced to 60 and 63 months in prison, respectively. The appeal challenges the denial of their motion to exclude from evidence the cocaine seized from "their" 1981 Oldsmobile. We say "their" Oldsmobile, although it was registered to someone else, because the government does not question their right, akin to that of a tenant, bailee, borrower, or other lawful occupier or possessor, to object to the seizure. The cases are quicker to draw the analogy in the case of the driver of a vehicle, *United States v. Garcia*, 897 F.2d 1413, 1418-19 (7th Cir.1990); *United States v. Soto*, 988 F.2d 1548, 1553 (10th Cir.1993); *United States v. Miller*, 821 F.2d 546, 548-49 (11th Cir.1987), than in the case of a passenger, *Rakas v. Illinois*, 439 U.S. 128, 148-49, 99 S.Ct. 421, 433, 58 L.Ed.2d 387 (1978); *United States v. Lechuga*, 925 F.2d 1035,

1037, 1041 n. 3 (7th Cir.1991); *United States v. Roberson*, 6 F.3d 1088, 1091 (5th Cir.1993), but the government does not ask us to make that distinction here.

The defendants argue that the stop which led to their consenting to the search of the car violated the Fourth Amendment, invalidating the consent and hence the search; and that independently of this the seizure of the drugs, which was from the inside of the door of the car, violated the Fourth Amendment because, even if a superficial search of the car was proper as an incident of the stop, the officers needed and lacked probable cause to open the compartment and seize its contents.

Police officers in Milwaukee keep a regular watch on motels, looking for drug runners. Cruising through a motel parking lot one day in 1992, a detective named Pautz, a two-year veteran of the Milwaukee County Sheriff's Drug Enforcement Unit, spotted a 1981 two-door Oldsmobile with a California license plate. Pautz was interested. Two-door General Motors cars of that vintage are believed by law enforcement authorities to be drug traffickers' favorites (though not their only favorites, *United States v. Sharpe*, 470 U.S. 675, 682 n. 3, 105 S.Ct. 1568, 1573 n. 3, 84 L.Ed.2d 605 (1985); *United States v. Ocampo*, 890 F.2d 1363, 1366 (7th Cir.1989)) because it is easy to conceal drugs in them. And California, like other states on the eastern, western, and southern borders of the United States, is a state from which drugs are shipped to other states, a "source" state. So Pautz called up his dispatcher on his car radio and asked him to find out whom the car was registered to. Now in fact it was registered to "Ornelas, Miguel Ledesma," of San Jose, California, who may or may not be related to one of the

defendants. But we do not know what exactly the dispatcher told Pautz or what exactly Pautz understood – whether it was "Miguel Ledesma Ornelas" or "Miguel Ornelas Ledesma." Confusion on this score is understandable, though not justifiable. Spanish naming conventions are confusing to non-Hispanic Americans. When a Hispanic has two surnames, such as Ornelas Ledesma or Ledesma Ornelas, the first is his father's last name and the second his mother's maiden name. The first is primary, and the second subordinate – exactly the reverse of the middle and last names of non-Hispanics. To a Hispanic, therefore, "Ornelas, Miguel Ledesma," would denote Miguel Ornelas Ledesma rather than, as a non-Hispanic would expect, Miguel Ledesma Ornelas. But if the motor vehicle authorities, the dispatcher, or Pautz were unfamiliar with Spanish naming conventions (and Pautz testified that he *was* unfamiliar with them), "Ledesma" and "Ornelas" could easily get reversed.

Pautz, believing that he had the name of the car's registered owner, entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas had registered at 4:00 a.m. and had been accompanied by another man. Pautz then called his partner, Detective Hurrle, to join him. When Hurrle arrived, the two officers called the Milwaukee office of the Drug Enforcement Administration and asked it to run a NADDIS check on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas. NADDIS (Narcotic and Dangerous Drug Information System) is a computerized compilation of the federal Drug Enforcement Administration's information on known and suspected drug traffickers. NADDIS reported two "hits." One was on Miguel Ledesma

Ornelas, also known as Miguel Lemus-Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car. The other "hit" was on Ismael Ornelas, Jr., of Tucson, Arizona, reported by the computer to be a 1000-kilogram-per-month cocaine dealer, although no "wants" or warrants were outstanding against him. The officers did not attempt to obtain descriptions of the two suspected dealers, neither of whom in fact is one of or, as far as we know, related to the defendants.

Because the car was an older GM two-door, because its occupants had checked in at the motel at 4:00 a.m. without having made reservations in advance, because there were two persons rather than just one and at least one of them was Hispanic, and because they apparently had come from a "source state" – and of course because of the "hits" on similar or identical names – the officers decided to stop and question the men when they left the motel. At this point a third officer arrived, Luedke, bringing with him a drug-sniffing dog; and Pautz left. After a time, two men emerged from the motel and entered the Oldsmobile. The officers parked their cars on either side of it. Hurrle tapped the window on the driver's side, identified himself as a police officer, and asked both men for identification. Saul Ornelas, who was in the driver's seat, produced a driver's license in that name; Ismael Ornelas-Ledesma, who was in the front passenger's seat, produced a driver's license in the name of Ismael Ornelas, residing in Martinez, California. Hurrle asked whether there were any drugs in the car. The occupants said "no." Hurrle asked them for permission to search the

car, and they gave their permission. The two men were not placed under arrest but the government concedes that a reasonable person in their position would not have felt free to leave. So the encounter was a so-called "*Terry* stop" (after *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); *INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *United States v. Adebayo*, 985 F.2d 1333, 1338-39 (7th Cir.1993), a semi-arrest that is lawful under the Fourth Amendment if but only if the officers had a "reasonable suspicion supported by articulable facts" that the persons stopped were engaged in criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

Officer Luedke inspected the interior without canine assistance and noticed a loose panel on the passenger's door. One of the screws by which the panel was fastened to the door was – Luedke testified – rusty. To him this meant that it had been removed recently. He didn't explain why, but maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting. Suspecting that drugs were concealed behind the panel, Luedke pried it open. His hunch was correct; there was a package containing two kilograms of cocaine wrapped in aluminum foil and paper. Ornelas and Ornelas-Ledesma were then arrested.

Clearly, were it not for the NADDIS hits, the officers would not have had grounds for *reasonable* suspicion that the defendants were drug traffickers. Not only is every circumstance on which the officers relied other than the

hits innocent taken by itself – many Americans (approximately one in eight) are Californians, many Californians are Hispanic, many Americans drive two-door General Motors cars, many people check into motels very late at night (or early in the morning), many travel in pairs rather than alone, and many do not make advance reservations – but the confluence of these circumstances is pretty innocuous as well, especially since many of the circumstances are correlated rather than independent. Hispanics are disproportionately concentrated in California, and having on average lower incomes than non-Hispanic Americans are doubtless more likely than other Americans to drive two-door rather than four-door cars, older rather than newer cars, and American rather than foreign cars. They are more likely to drive than to fly and, we imagine, less likely to make reservations in advance at motels, since cheap motels don't advertise much or have 800 numbers. Nothing is more common than for people taking long trips to drive until they're tired and then – often at very odd hours – to check in at the nearest motel, of course without a reservation. And people who drive long distances late at night prefer to have someone with them. Because the "suspicious" circumstances (other than the NADDIS hits) are so strongly correlated with each other, were they considered sufficient by themselves to justify a stop the practical consequence would be that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking. Hispanics would be second-class citizens in the eyes of the police. Although a brief investigatory stop is less intrusive than an arrest, it is sufficiently redolent of

police-state tactics for courts to insist in the name of the Fourth Amendment that its use be circumscribed.

So we must ask what the NADDIS hits added to a "drug courier profile" that seems only a little better than a dragnet for Hispanics. It would be nice to *know* something about NADDIS, but the government successfully opposed the defendants' efforts to obtain discovery aimed at determining the character and reliability of the information in the NADDIS data base, and as a result the record is bare of evidence about it. At argument the government's lawyer, while saying that she has used NADDIS herself, disclaimed any knowledge about the system except how to access it. We do not know how many names are in it currently, where exactly the names come from, whether any of the information inputted into the system is screened for reliability before being entered, whether anyone checks to make sure that errors are not made in inputting information, whether information is updated systematically, and (a closely related question) whether information discovered to be stale or inaccurate is removed from the system. Although a number of judicial opinions mention NADDIS in passing – obviously it is widely used in drug enforcement – we have found no considered judicial assessment of its reliability, although we have found occasional judicial expressions of concern about that reliability. *United States v. $7,850 United States Currency*, 7 F.3d 1355, 1358 (8th Cir.1993); *United States v. $215,300 United States Currency*, 882 F.2d 417, 419 and n. 2 (9th Cir.1989) (per curiam); *United States v. Saperstein*, 723 F.2d 1221, 1232 (6th Cir.1983).

Maybe NADDIS is no better than a vast compendium of rumors, errors, and libels: garbage in, garbage out.

That seems unlikely. It would not be heavily used by drug enforcement authorities if it were merely a random sample of the American population. Which is not to say, however, that it is *highly* reliable; concern that it may not be is heightened by the (scanty) secondary literature, which depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated. See UPI Release, "VIP Names in Drug Agency's Computer Files," July 3, 1984; Vanessa Jo Grimm, "Behemoth DEA Database Tracks Drug Smugglers," *Government Computer News*, July 8, 1991, p. 85. According to the UPI Release, as of 1984 NADDIS contained 1.5 million names, obtained from debriefings of informants and suspects and from surveillance and intelligence reports of various law enforcement agencies.

As an example of NADDIS's possible unreliability, we note that according to it Ismael Ornelas, Jr., of Tucson, a 1000 kilogram a month dealer – a *large* dealer – is not wanted by any law enforcement authority in the country. Maybe *that* Ornelas (who is neither Saul Ornelas nor Ismael Ornelas-Ledesma nor the registered owner of the Olds) died years ago or is some practical joker's or desperate informant's fictional creation or is an honest man falsely accused by an enemy. Because the reliability of information stored in NADDIS is unknown, that information must, on the record before us, be reckoned no more reliable than that of an informant not known to be reliable. Therefore, since an uncorroborated tip from such an informant cannot by itself furnish probable cause for an arrest or search, *Illinois v. Gates*, 462 U.S. 213, 227, 103 S.Ct. 2317, 2326, 76 L.Ed.2d 527 (1983), an unverified, uncorroborated entry in NADDIS cannot do so either.

United States v. $7,850 United States Currency, supra, 7 F.3d at 1358; *United States v. $215,300 United States Currency, supra*, 882 F.2d at 419 and n. 2; *United States v. Saperstein, supra*, 723 F.2d at 1232. The issue here, it is true, is not probable cause, but reasonable suspicion, because we are dealing with a stop rather than an arrest. But the Supreme Court has held that an uncorroborated anonymous tip, even when it comes from law enforcement authorities, does not by itself justify a stop. *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 682, 83 L.Ed.2d 604 (1985). The statement in *United States v. Troka*, 987 F.2d 472, 474 (7th Cir.1993), that "the police department was a reliable source," must be understood in context (the police department was a reliable source *in the circumstances of that case*), rather than as a quixotic effort to overrule the Supreme Court.

That cannot be the end of our analysis, however. NADDIS furnished two tips, not one. "Ismael Ornelas," the name on the motel registry, was very similar to "Ismael Ornelas, Jr.," the name in NADDIS. And while the names Miguel Ornelas Ledesma and Miguel Ledesma Ornelas are as different from each other as Francis Scott Key and Francis Key Scott, the names could easily have been reversed in entering them in the computer, just as "Jr." could easily have been left off a motel registry. So there was some reason to believe that the registered owner of the Olds was the Miguel Ornelas Ledesma, or Miguel Ledesma Ornelas, identified by NADDIS as a suspected drug dealer. Even if NADDIS is not terribly reliable, some or for that matter many entries in it may be accurate or at least approximately so. And the fact that *both* the registered owner of the car *and* the name on the

motel registry corresponded more or less to names of suspected drug dealers in the NADDIS database was impressive. One "hit" might well be coincidence; it was much less likely that two – one corresponding to the name in the hotel registry, presumably that of either the driver or the passenger; the other to the name of the registered owner, who might or might not be one of the two men in the motel – were, though this depends in part on how common the names "Ornelas" and "Ledesma" are. Paradoxically, the very unreliability of NADDIS (if it is unreliable) might strengthen the inference that the two men in the Olds were involved in the drug trade; inverting last and middle names is just the kind of mistake that one would expect in a carelessly maintained database. A mistaken premise can furnish grounds for a *Terry* stop, if the officers do not know that it is mistaken and are reasonable in acting upon it. *Illinois v. Rodriguez*, 497 U.S. 177, 184-86, 110 S.Ct. 2793, 2799-2800, 111 L.Ed.2d 148 (1990); *United States v. De Leon-Reyna*, 930 F.2d 396, 399 (5th Cir.1991) (en banc) (per curiam); *United States v. Walraven*, 892 F.2d 972, 974-75 (10th Cir.1989).

The tips were mutually corroborating; and the other circumstances on which the officers relied (the make and type of the car, the state it came from, etc), insufficient as they were by themselves to create a suspicion reasonable enough, substantial enough, to justify the infringement of personal liberty that is brought about by an investigative stop, may, when taken together with the NADDIS "tips," have tipped the balance in favor of a finding of reasonable suspicion. *United States v. Esieke*, 940 F.2d 29, 34 (2d Cir.1991), and *United States v. Morin*, 665 F.2d 765 (5th Cir.1982), factually similar cases although stronger for the

government, so suggest. And the Supreme Court held in *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), that an anonymous tip can create reasonable suspicion if corroborated. The form the corroboration took in that case was verification of a prediction made by the informer, but there is no magic in a particular form of corroboration. The circumstances that first aroused Pautz's suspicions were corroborative of the "anonymous tips" furnished by NADDIS in the sense that they made it likelier than otherwise that NADDIS was, in this instance anyway, accurate. Standing alone, the drug courier profile that first aroused Pautz's suspicions was very little. Standing alone, one NADDIS "hit" could not, in the absence of any evaluation of NADDIS's reliability, be thought much either. The second "hit," however, added to the credibility of the first; and together the profile and the "hits," though still not enough evidence of crime to furnish probable cause to search the car, could satisfy the lesser showing required for a *Terry* stop.

Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; the proposition that review of a district court's determination of reasonable suspicion (if it is a *Terry* stop) or probable cause (if it is an arrest, search, or seizure) is plenary, embraced in such cases as *United States v. Jaramillo*, 891 F.2d 620, 626 (7th Cir.1989), is no longer tenable after *United States v. Spears*, 965 F.2d 262 (7th Cir.1992), where, overruling inconsistent precedents, this court held that the standard for judicial review of determinations of probable cause was clear error. There is no basis for distinguishing in this regard between probable cause and

reasonable suspicion. They are adjacent points on a continuum.

Since the stop was lawful, we need not decide whether, had it been unlawful, the defendants' consent to search would nevertheless have been valid even though (a relevant factor, though not a decisive one, *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-33, 249, 93 S.Ct. 2041, 2049-51, 2059, 36 L.Ed.2d 854 (1973)) the officers failed to advise the defendants of their right not to consent. *United States v. Valdez*, 931 F.2d 1448, 1451 (11th Cir.1991); *United States v. Valencia*, 913 F.2d 378, 381 (7th Cir.1990). But we do not think the denial of the motion to suppress the drugs seized from the door of the Olds can be upheld on the basis of the record compiled in the district court. The government does not argue that a *Terry* stop justifies so intrusive a search. The only lawful purpose of a search incident to a *Terry* stop is to protect the officers from the danger that the persons they have stopped will reach for a weapon, *Minnesota v. Dickerson*, ___ U.S. ___, ___, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993); *Michigan v. Long*, 463 U.S. 1032, 1049-51, 103 S.Ct. 3469, 3481-82, 77 L.Ed.2d 1201 (1983), and ordinarily and here the officers do not have to dismantle a car to satisfy themselves on that score. Nor does the government argue that the consent to search that *Ornelas* and *Ornelas-Ledesma* gave the officers was consent to dismantle the car. *United States v. Garcia*, *supra*, 897 F.2d at 1419-20; but *cf. United States v. Pena*, 920 F.2d 1509, 1515 (10th Cir.1990). The seizure was lawful, therefore, only if the search yielded information that gave Officer Luedke probable cause to believe that contraband was secreted behind the loose panel. If so, no search warrant was required, even for a search that would

require taking the car apart. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

In arguing that there was probable cause for the search that discovered the drugs secreted in the car door, the government places great weight on the loose panel and the rusty screw. But the screw was not rusty. The magistrate judge to whom the motion to suppress was referred for a recommended ruling looked at the screw and found no indication of rust. The screw is in the appellate record and we have looked at it ourselves. There is not the slightest trace of rust or of anything that looks like rust. It is a Phillips screw and the head contains scratches that suggest it might have been removed and reinserted, but Luedke was adamant that it was signs of rust that caused him to believe that the panel had been removed recently and then put back in place. Having inspected the screw, the magistrate judge naturally disbelieved Luedke's testimony that the screw had looked rusty. Without discussing the bearing of Luedke's testimony about the loose panel on the issue of probable cause, the magistrate judge concluded that the seizure of the drugs had not been supported by probable cause. But noting the presence of the drug-sniffing dog, he found that the drugs would have been discovered anyway and therefore upheld the seizure on the ground of inevitable discovery. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The district judge upheld the seizure, too, but not on the magistrate judge's ground but rather on the ground that the allegedly loose panel alone, which the magistrate judge had not discussed, furnished probable cause. The government defends Luedke's testimony about the rust

by arguing that it was dark inside the car (though it was broad daylight) and maybe the screw looked rusty though it wasn't; we are more accustomed to being told of the remarkable eyesight of the police that enables them to see tiny objects at great distances in the dark. *United States v. Sophie*, 900 F.2d 1064, 1073 (7th Cir.1990); *United States v. Gilliard*, 847 F.2d 21, 24 (1st Cir.1988); *cf. United States v. Pinto-Mejia*, 720 F.2d 248, 262 (2d Cir.1983). In any event, the magistrate judge was not required to believe Luedke or recast his testimony in a believable form.

The magistrate judge concluded that Luedke did not have probable cause to seize the drugs; the district judge concluded that he did. Can we uphold the district judge's determination, in view of this disagreement? The standard for judicial review of a determination of probable cause is, as we have noted already, clear error; and this is so whether the determination is made by a magistrate judge or by a district judge. *United States v. Spears, supra; United States v. Adebayo*, 985 F.2d 1333, 1337 n. 2 (7th Cir.1993). A qualification is necessary, however, for the case in which the magistrate judge, rather than determining probable cause en route to issuing a warrant later challenged by a motion to suppress evidence seized pursuant to it, is merely recommending the disposition of a motion referred to him by a district judge to suppress evidence obtained as a result of a search, or an arrest, made without a warrant. In the first case, the relation between district judge and magistrate judge is that of reviewing court to court of first instance, and the usual standard of appellate review of findings of fact and of the application of a legal standard to such findings applies.

In the second case – which is our case – not only may the district judge (with inapplicable exceptions) "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations," 28 U.S.C. § 636(b)(1); he is required "to make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." *Id.*

The question whether the district judge's power of de novo determination authorizes him to reject a magistrate judge's finding of credibility, without the district judge's hearing the witness himself, was left open in *United States v. Raddatz*, 447 U.S. 667, 681 n. 7, 100 S.Ct. 2406, 2415, 65 L.Ed.2d 424 (1980), though with a broad hint, picked up in *Proffitt v. Wainwright*, 685 F.2d 1227, 1237, 1241 (11th Cir.1982), that the answer is "no." See also *Grassia v. Scully*, 892 F.2d 16, 19-20 (2d Cir.1989); but cf. *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir.1988). We need not answer the question here. Rather than reject the magistrate judge's finding that Luedke's testimony about the rusty screw should not be believed, the district judge found probable cause for the seizure in a part of Luedke's testimony that the magistrate judge had not relied upon – the testimony that the panel was loose. A number of cases, illustrated by *United States v. Lugo*, 978 F.2d 631, 637 (10th Cir.1992), treat a loose door panel as a telltale sign of drug running – but not as sufficient in itself to constitute probable cause. (In *United States v. Garcia, supra*, 897 F.2d at 1416, the officers saw packages peeping out from behind the loose panel.) The facts of this case show why. The car was eleven years old when Officer Luedke conducted the search. We mean no disrespect to

Detroit in observing that the interior of a 1981 Olds unlike that of a Rolls Royce is apt to be rather worn and battered after eleven years. The fact that a door panel is loose does not by itself create a reasonable likelihood that the panel conceals a secret compartment containing contraband. *State v. Swanson*, 172 Ariz. 579, 838 P.2d 1340, 1345-48 (App.1992). Here as in most cases there was more, but not much more: mainly the NADDIS "hits" of unproven reliability.

We need not decide, however, whether the NADDIS hits (remember that there were two, and that this enhances their reliability), plus the fact that the defendants fit the drug courier profile, plus a loose door panel add up to probable cause – whether in other words the loose panel could turn reasonable suspicion into probable cause. For we do not know whether Luedke's testimony about the door panel should be believed. The only judicial officer who heard him testify was the magistrate judge, who failed to indicate whether he believed the testimony. Since the magistrate judge disbelieved a closely related part of Luedke's testimony, and the district judge did not overturn *that* credibility finding, it can hardly be *assumed* that the magistrate judge would surely have believed Luedke's testimony about the door panel, or that if he had disbelieved it would surely have been reversed by the district judge. Nor did the latter base his determination on a viewing of the car; there was no viewing. Even if, contrary to *Proffitt*, and to decisions involving the parallel case of administrative review of administrative law judges' credibility determinations, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495-97, 71 S.Ct. 456, 468-469, 95 L.Ed. 456 (1951); *NLRB v. Augusta*

Bakery Corp., 957 F.2d 1467, 1475-76 (7th Cir.1992); *Ortiz-Salas v. INS*, 992 F.2d 105, 108 (7th Cir.1993), a district judge can reject a magistrate judge's determinations of credibility without hearing the witnesses' testimony himself, we do not think that he can be permitted to ignore the issue of credibility altogether. We do not think that he can accept challenged testimony given before another judicial officer without giving a reason for resolving the issue himself rather than referring the matter for initial determination by the other officer.

This oversight would be academic if the magistrate judge's alternative ground for upholding the seizure – inevitable discovery by Luedke's dog – was so clearly correct that we could uphold it without the benefit of the district judge's views, as in *United States v. Lewis*, 621 F.2d 1382, 1387 (5th Cir.1980). We cannot. No evidence was presented concerning the dog's capabilities. For all we know he is an infallible sniffer of two kilograms of cocaine wrapped and hidden behind the door panel of a car; but we cannot take judicial notice of this fact. We don't know and have not been told anything about this dog except his name (Merlin), although our own research reveals that a Milwaukee drug-sniffing dog named Merlin, presumably the same beast, has on at least one occasion detected drugs in a piece of luggage when there weren't any. *Schaefer v. United States*, 656 F.Supp. 631, 632 (E.D.Wis.1987). If Merlin is *that* good, no doubt he could sniff the cocaine in the door of the defendants' car, but the government has not had the audacity to argue that a dog who can detect nonexistent drugs is an infallible inevitable discoverer of existent drugs. We may be too hard on Merlin; maybe he sniffed the residue of drugs in

the luggage in the *Schaefer* case; maybe it was a different dog with the same name. But the government in its brief, without going so far to confess error on the magistrate judge's alternative ground (that is, inevitable discovery), does not defend it, even though defendant Ornelas had attacked it at some length in his opening brief. The government does not, for example, respond to Ornelas's damaging quotation from the testimony of Detective Hurrle: "I don't know if he [the dog] necessarily would have hit on this particular cocaine." (To which it can be added that we don't know whether the dog would have been directed to sniff in or about the car if Luedke's search had disclosed no suspicious circumstances.) We cannot affirm on a ground that has been waived, *Crane v. Indiana High School Athletic Ass'n*, 975 F.2d 1315, 1319 (7th Cir.1992); *Frederick v. Marquette Nat'l Bank*, 911 F.2d 1, 2 (7th Cir.1990), and the government has waived the defense of inevitable discovery by failing to defend the magistrate judge's determination. Perhaps it did this because it believed that the determination could not be defended. It put all its eggs in the probable-cause basket, and the eggs are broken.

The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first

aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw. For while it is plain that it is not rusty, it does look as if it had been scratched in just the way one would expect if it had been removed and reinserted, though its appearance could we suppose reflect its removal by Officer Luedke or other handling since. The test for probable cause is objective. It is not what the officer in question actually believed but what a reasonable officer in his position would have believed. *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978); *Mahoney v. Kesery*, 976 F.2d 1054, 1057-58 (7th Cir.1992). A reasonable officer would not have believed the screw rusty but might have believed it showed (other) evidence of having been removed and reinserted. That is a matter to be explored on remand.

The judgments of conviction are vacated and the case is remanded for further proceedings consistent with this opinion. The other grounds raised by the appellants have too little merit to warrant discussion.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

-vs- **Case No. 92-CR-243**

ISMAEL ORNELAS-LEDESMA and SAUL ORNELAS,

Defendants.

ORDER

(Filed Mar. 15, 1994)

This matter comes before the Court on defendants' joint request for a status conference to determine the procedure on remand. The Court sees little reason for a status conference. The 7th Circuit issued clear instructions in this regard:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedtke's testimony on the loose panel himself (or at least view the car interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedtke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel.

United States of America v. Ismael Ornelas-Ledesma, et. al., Slip Opinion at 15 in Nos. 93-2356, 93-2405, dated February 10, 1994 (7th Cir. 1994). Defense counsel has indicated to the Court that the Government is unwilling to settle the matter and intends to proceed. Therefore, consistent with the 7th Circuit's remand order, the matter shall be referred to Magistrate Judge Robert L. Bittner for purposes of determining the credibility of Officer Luedtke's testimony regarding the loose door panel and, if said testimony is found to be credible, for purposes of determining whether that testimony, in conjunction with the NADDIS tips as corroborated by the drug courier profile, established probable cause to search.

Dated at Milwaukee, Wisconsin, this 15th day of March, 1994.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISMAEL ORNELAS-LEDESMA and SAUL ORNELAS,

Defendants.

Case No. 92-CR-243

MAGISTRATE JUDGE'S POST-REMAND RECOMMENDATION TO THE HONORABLE RUDOLPH T. RANDA RE: DEFENDANTS' MOTIONS TO SUPPRESS

(Filed Mar. 29, 1994)

NATURE OF CASE

On February 12, 1993 this Court issued a recommendation on motions to suppress physical evidence filed by defendants Saul Ornelas and Ismael Ornelas-Ledesma. In addressing the defendants' motions to suppress, this court concluded the defendants were lawfully subjected to an investigatory detention based upon reasonable suspicion and clearly consented to a search of the 1981 Oldsmobile. However, this Court further concluded that, under governing case law, the consent did not extend to the door panels and a search of those door panels was not supported by requisite probable cause, because the testimony of Milwaukee County Deputy Sheriff Lyle Luedke, regarding the presence of rust in the groove of the Phillips screw used to attach the vent cover to the door, was not credible. Nonetheless, this Court recommended denial of the defendants' motions to suppress evidence,

since the seizure of cocaine fell within the inevitable discovery exception to the Fourth Amendment exclusionary rule of *Nix v. Williams*, 467 U.S. 431, 433 (1984).

Subsequently, in a March 9, 1993 order, United States District Judge Rudolph T. Randa considered the defendants' objections to the recommendation and ruled the holding regarding inevitable discovery was unnecessary, because the facts found by this Court established probable cause to remove the door panel vent cover and search the compartment behind it. Thereafter, Judge Randa accepted conditional pleas of guilty, pursuant to Fed. R. Crim. 11(a)(2), from the defendants who then appealed the adverse suppression decision.

The Court of Appeals for the Seventh Circuit issued a decision in the matter on February 10, 1994 vacating the defendants' judgments of conviction and remanding the case for further proceedings consistent with its opinion which holds:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the

> panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw.

United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405 (slip op. at 15) (7th Cir. Feb. 10, 1994). On March 15, 1994 Judge Randa, in turn, referred the matter to this Court for further proceedings in accord with the directions of the Court of Appeals.

DISCUSSION AND ANALYSIS

In its recommendation, this Court made the following findings of fact:

> When Hurrle announced he had completed the search of the trunk, with negative results, Luedke proceeded to the passenger area of the vehicle and checked to see whether the back seat was loose. Upon finding it was not, he examined the right rear quarter panel near the handle. *He found this panel to be loose.* Based upon his training, Luedke suspected the panel had been removed and contraband was hidden inside. Luedke testified he then observed the vent area of the door, noticing the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led him to believe the vent cover had recently been removed. Luedke then released the screw, dismantled the vent area of the door, and exposed a cavity approximately five (5) inches high and four (4) inches wide which contained a paper bag in which he felt a hard block.

(Emphasis added.) (February 12, 1993 Recommendation at 6.)

Officer Luedke's testimony as to the screw was found by this Court to be incredible, in light of the undisputable condition of the screw itself. Nonetheless, except for the rule of *Falsus In Uno Falsus Tu Omnibus,* I have no reason not to believe the panel was loose. Thus, I accept as credible Luedke's testimony that the panel was loose. However, the loose panel alone, given the age of the Oldsmobile, is not probative evidence of the fact it necessarily had been recently removed. *See United States v. Ornelas-Ledesma, et al.* Nos. 93-2356, 93-2405, slip op. at 13 (observing the interior of a 1981 Oldsmobile, unlike that of a Rolls Royce, is apt to be rather worn and battered after eleven [11] years).

So what else is there besides the loose panel to establish probable cause that the compartment had recently been opened and contained contraband. Answer: Only the two (2) NADDIS "hits" and the questionable "drug courier" profile consisting of the facts the defendants were Hispanic Californians driving a two-door General Motors car who had checked into a motel very early in the morning, traveled as a pair rather than alone, and had not made advance reservations. *See United States v. Ornelas-Ledesma, et al.* Nos. 93-2356, 93-2405, slip op. at 5 ("confluence of the circumstances is pretty innocuous . . . especially since many of the circumstances are correlated rather than independent"). The NADDIS computer reports showed a "hit" on Miguel Ledesma Ornelas, also known as Miguel Lemus-Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car; and a second "hit" on Ismael Ornelas, Jr., of Tucson, Arizona who was

reported to be a 1,000 kilogram per month cocaine dealer, although no "wants" or warrants were outstanding against him. Thus, the NADDIS reports are so convoluted and mismatched that they are of little probative value in the probable cause determination. Consequently, the only evidence in the probable cause calculus is the loose panel, a weak drug courier profile, and inconclusive MADDIS "hits." There is just not enough evidence for a reasonable law enforcement officer to believe the door compartment contained contraband, as opposed to being a mere sign of an aging General Motors automobile. *See State v. Swanson*, 838 P.2d 1340, 1345-48 [Ariz. App. 1922]) (no probable cause to believe evidence of crime would be found in the space behind door panels; the screws of which appeared to have been tampered with and were loose, where only other facts were defendant became nervous when the officer opened the vehicle door, and supposed "drug courier profile" consisted of facts that defendant and his passenger were traveling east on an interstate highway in a rental car with electronic paging equipment and a cellular phone). Missing are any additional indicia requisite to a finding of probable cause, as noted in the following cases. *See United States v. Lugo*, 978 F.2d 631, 637 (10th Cir. 1992) (suggesting probable cause to search behind door panels may have existed because totality of circumstances suggested the hidden space contained contraband: defendant was armed, traveling interstate, did not have luggage or other articles normally associated with such a trip; displayed noticeable interest in locking his truck after being told by officers not to; had a weapon within easy reach along with a fully loaded clip, and additional ammunition on the floor of the trunk; and there was a

loosened door panel with a creased edge indicating someone had accessed the cavity inside); *United States v. Pena*, 961 F.2d 333, 339 (2nd Cir. 1992) (defendant entitled to evidentiary hearing on whether probable cause existed for search of door panel where facts in addition to those furnishing reasonable suspicion for investigatory detention were "asserted discovery of an empty bag and screwdriver in the back seat of detained automobile"); *United States v. Arango*, 912 F.2d 441, 447 (10th Cir. 1990), *cert. denied*, 499 U.S. 924 (1991) (probable cause for arrest where officers noticed truck bed did not seem right because it was very shallow, after lifting the tailgate corner of a rubber mat covering truck bed, observed that truck bed had apparently been modified; their knocks on truck bed suggested hidden compartment was running beneath the bed; and defendant had inadequate amount of luggage for purported two [2] week vacation); *United States v. Garcia*, 897 F.2d. 1413, 1419 (7th Cir. 1990) (upholding search of door panels when, while conducting consensual visual search, officers noted lack of window cranks and door handles mismatched and ill fitting screws on the door panels, and spotted packages inside the door while looking through the window opening); *United States v. Thomas*, 787 F.Supp. 663, 684 (E.D. Tex. 1992), *aff'd without op.*, 983 F.2d 1062 (5th Cir. 1993) (probable cause to open exterior side panels of vehicle based on drug sniffing dog's strong alert); *Munguia v. State*, 737 S.W.2d 658, 660 (Ark. App. 1987) (marijuana residue on car floor boards and loose fitting door panel warranted reasonable belief additional marijuana would be found in door panel).

In its opinion, the Court of Appeals also suggested the Court might wish to consider the evidence of the loose panel in conjunction with the Phillips screw which, upon examination by the Appellate Court, "looked as if it had been scratched in just the way one would expect if it had been removed and reinserted", though also noting its appearance could "reflect its removal by Officer Luedke or other handling since." *United States v. Ornelas-Ledesma, et al,* Nos. 93-2356, 93-2405, slip op. at 15. However, the parties orally stipulated to resolution of the matter based upon the prior record.

Review of that record discloses Luedke "used a small pocket-type knife to remove the Philips screw from the plastic vent cover" (Tr. 156). Luedke further testified "a closer examination of that screw indicated there was rust in the area of the Philips head of the screw" (Tr. 155-156). When the screw was brought to this Court for examination, it was contained in a film canister which was fitted with cotton (Tr. 423). The record regarding the condition of the screw and the source of any scratches on it which the Court of Appeals observed is inconclusive. Based on the parties' stipulation, this Court has not reexamined the screw and the record is insufficient for this Court to make a determination of when or how the screw was scratched. Consequently, any scratches on the screw have no impact on this Court's determination that there was not probable cause for the search of the door panel.

It may be that, based upon this Court's recommended disposition of the defendants' motions to suppress, Judge Randa may decide the record regarding the scratches on the screw requires further development.

However, due to the fact the defendants, whose appearance would be requisite at a supplemental evidentiary hearing, pursuant to Fed. R. Crim. P. 43(a), are confined in California, necessitating two (2) to three (3) weeks advance notice of an evidentiary hearing in this District so they could be transported here by the United States Marshal, it is impossible for me to conduct such a hearing by reason of my March 31, 1994 retirement from the bench.

In sum, this court finds testimony of Officer Luedke regarding the loose panel is credible, but that testimony combined with the other factors which contributed to reasonable suspicion to stop the defendants, did not establish probable cause to search the door panel.[1] The record regarding the scratches on the screw is inconclusive and does not contribute to this Court's probable cause calculus. Consequently, this Court will recommend that the defendants' motions to suppress physical evidenced be granted.

---

[1] In its February 12, 1993 recommendation, this Court also found there was not probable cause for a search of the door panel. However, it recommended the defendant's motions to suppress be denied, based upon its finding that discovery of the cocaine in the door panel fell within the inevitable discovery exception to the exclusionary rule. This finding was not defended on appeal by the government and, consequently, has been waived. *United States v. Ornelas-Ledesma, et al.*, Nos. 93-2356, 93-2405, slip op. at 15.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **GRANTING** defendant Saul Ornelas' motion to suppress and exclude physical evidence; and,

IT IS FURTHER RECOMMENDED that the United States District Judge enter an order **GRANTING** that aspect of defendant Ismael Ornelas-Ledesma's motion to suppress items seized from the 1981 Oldsmobile.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule 13.03 (E.D. Wis.), whereby written objections to the foregoing recommendation may be filed in duplicate with the Clerk of Court within ten (10) days hereof. Failure to file a timely objection shall result in a waiver to your right to appeal

Dated at Milwaukee, Wisconsin this 29th day of March, 1994.

/s/ Robert L. Bittner
ROBERT L. BITTNER
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs- **Case No. 92-CR-243**

SAUL ORNELAS and
ISMAEL ORNELAS-LEDESMA,

Defendants.

DECISION AND ORDER

(Filed Sep. 20, 1994)

This matter comes before the Court on remand from the Seventh Circuit for purposes of additional fact-finding and reconsideration of the probable cause issue. The facts of the case, with one addition, are as stated in the initial Magistrate's recommendation dated February 12, 1993, which the Court adopts and incorporates here by this reference.

On February 12, 1993, Magistrate Judge Robert L. Bittner issued a recommendation that defendants' motions to suppress the cocaine at issue be denied. The Magistrate's recommendation was not based on the existence of probable cause. Rather, the Magistrate found that the case fit within the "inevitable discovery" exception to the probable cause requirement. In a decision dated March 9, 1993, this Court upheld the Magistrate's recommendation, but on different grounds. This Court found that the drug courier profile, the two NADDIS hits and

the loose door panel, constituted probable cause to remove the door panel and search for drugs. The defendants entered conditional pleas and appealed the suppression issue. The Seventh Circuit vacated the decision on grounds that this Court incorrectly thought the Magistrate had ruled upon the credibility of Officer Luedtke's testimony concerning the loose door panel. The Circuit Court then gave explicit instructions regarding what was to be done on remand:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedtke's testimony on the loose panel himself (or at least view the car interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedtke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel.

United States v. Ornelas-Ledesma, 16 F.3d 714, 721-22 (7th Cir. 1994).

On remand, this Court again referred the matter to the Magistrate for purposes of making an initial determination regarding the credibility of Officer Luedtke's testimony and the existence of probable cause. The Magistrate found Officer Luedtke's testimony regarding the loose door panel credible, and this Court accepts that finding. The Magistrate further found, however, that

adding the loose door panel to the drug courier profile and the two NADDIS hits was not sufficient to establish probable cause. This is contrary to the Court's original conclusion, which found that "reasonable suspicion became probable cause when Officer Luedtke found that the right rear door panel of the car was loose."

The Court acknowledges that the issue is a close one, but weighing the evidence "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement," *see Texas v. Brown*, 460 U.S. 730, 742 (1983), the Court is compelled to reach the same conclusion. Both the Seventh Circuit and the Magistrate raised concerns regarding the broad brush of drug courier profiles, the reliability of the NADDIS system, and the significance of a loose door panel in a 12-year old car from General Motors. Viewed individually, these facts may be unremarkable. They become more meaningful when, in a specific case, they converge and form around two specific individuals. That is what happened here. The question is whether, based on that confluence of facts, Officer Luedtke was reasonable and justified in his belief that drugs lay within the defendants' car door. In answering this question, the law says that Officer Luedtke and his actions are not to be judged in hindsight. This means that his search is not justified by the fact that he was right, it also means that his search is not invalid simply because the names on the two NADDIS hits were not absolutely identical to the names provided, or because the addresses did not match up, or because the other information he relied upon was relatively innocuous when considered alone. The test is one of flexibility and

common sense, requiring only "practical, nontechnical probabilit[ies]". *Id.*

This case strikes the Court as an example of how common sense translates into good and constitutionally valid police work. As the Seventh Circuit noted, "Milwaukee police keep a regular watch on motels, looking for drug runners," *Ornelas-Ledesma*, 16 F.3d at 715. This makes sense, and this is what the officers were doing here when they discovered defendants' older model, two-door GM car with source state license plates. A routine survey thus became a hunch. An examination of the motel registry showed that the car was driven by two men who checked into the motel at 4:00 a.m. without advance reservations. The hunch thus grew stronger.[1] Then a NADDIS check on the registered owner of the vehicle scored a hit on a known or suspected heroin dealer, although the addresses did not match up. The hunch ripened into generalized suspicion. A NADDIS check on the name listed in the motel registry also scored a hit on a prolific cocaine dealer, although the addresses again did not match up and there was a "Jr." designation appended to the name retrieved by NADDIS. Nonetheless, two NADDIS hits on names virtually identical to those uncovered by the officers were too impressive to be coincidental. Generalized suspicion thus became reasonable suspicion directed at two specific individuals. After the

[1] While the Seventh Circuit recognized these facts as "innocent taken by [themselves]," *Ornelas-Ledesma*, 16 F.3d at 716, they do not preclude the officers from developing their intuition.

resulting *Terry*-stop, one of the suspects produced identification containing the name of the NADDIS cocaine dealer. Suspicions were confirmed and reinforced, Officer Luedtke asked for permission to search the vehicle, Consent was given. During a general search of the interior, Officer Luedtke discovered a loose door panel near the right rear seat.

What was Officer Luedtke to do? At this juncture, every additional step turned up additional information which dispelled doubt about the innocent nature of the facts and made the officers' suspicions stronger and more probable. Should Officer Luedtke have stopped at that point simply because a loose door panel on a 12-year old car, considered by itself, is likely to be a common occurrence? Or, does Officer Luedtke view the loose panel as the accumulated evidence directs him to view it, as his experience has told him to view it, and as a number of cases have also viewed it: "[A]s a telltale sign of drug running"? *Id.* at 720.[2] A competent police officer removes the door panel. He removes it because it is the final fact in a string of unbroken facts which establishes the probable cause equation.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The Government's objection to the Magistrate's recommendation is sustained and the defendants' motions to suppress are denied.

[2] *See* Magistrate's Recommendation dated February 12, 1993 at 6-7 ("Based upon his training, Luedtke suspected the panel had been removed and contraband was hidden inside).

Dated at Milwaukee, Wisconsin, this 20th day of September, 1994.

SO ORDERED,

/s/ Rudolph Randa
HON. RUDOLPH T, RANDA
U. S. District Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted March 2, 1995

Decided April 18, 1995

Before

Hon. Richard A. Posner, Chief Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	**Appeal from the United States District Court for the Eastern District of Wisconsin. No. 92 CR 243 Rudolph T. Randa, *Judge*.**
Nos. 94-3349, 94-3350 **v.** **SAUL ORNELAS, ISMAEL ORNELAS LEDESMA,** *Defendants-Appellants.*	)	

Order

This is a sequel to the decision of this panel in *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir. 1994), and familiarity with that decision is assumed. Briefly, we held that the district court had erred in denying the defendants' motion to suppress the fruits of a search of their automobile without making a determination of the credibility of Office Luedke's testimony that the panel behind which he found the drugs was loose. We remanded with directions to determine whether the panel was loose; if it was not, to grant the motion; and if it was, to consider

whether the loose panel, in conjunction with other suspicious circumstances discussed in our opinion, established probable cause for the search.

On remand, the district judge referred the issue of Luedke's credibility to the magistrate judge before whom Luedke testified and who had recommended that the motion be granted. Without granting a new hearing, the magistrate judge reported that he believed Luedke had testified truthfully about the loose panel. The district judge then determined that when the loose panel was considered in conjunction with the other circumstances, the search was indeed supported by probable cause.

The defendants appeal. Our review is deferential. The district judge's finding of probable cause may be set aside only if clearly erroneous. We do not find clear error. The district judge's opinion, although brief, adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search. The judgment of the district court must therefore be, and it is,

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITHOUT ORAL ARGUMENT

Date: April 18, 1995

BEFORE: **Honorable** RICHARD A. POSNER,
Chief Judge

Honorable JOEL M. FLAUM, Circuit Judge

Honorable DANIEL A. MANION,
Circuit Judge

Nos. 94-3349 and 94-3350

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAUL ORNELAS and
ISMAEL ORNELAS LEDESMA,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin
No. 92 CR 243, Rudolph T. Randa, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

SUPREME COURT OF THE UNITED STATES

No. 95-5257

Saul Ornelas and Ismael Ornelas-Ledesma,
Petitioners

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

November 6, 1995

Supreme Court, U.S.
FILED
DEC 19 1995
OFFICE OF THE CLERK

No. 95-5257

In The

Supreme Court of the United States

October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS

ROBERT G. LEBELL*
STYLER, KOSTICH, LEBELL DOBROSKI & MCGUIRE
100 East Wisconsin
Suite 1700
Milwaukee, WI 53202-4114
(414) 276-1233
Counsel for Petitioner Saul Ornelas

BRIAN W. GLEASON
230 W. Wells Street
Suite 702
Milwaukee, WI 53203
(414) 277-5076
Counsel for Petitioner Ismael Ornelas-Ledesma

Counsel of Record

Petition For Certiorari Filed July 17, 1995
Certiorari Granted November 6, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

I. IN NON-WARRANT CASES, SHOULD APPELLATE COURTS CONDUCT A *DE NOVO* STANDARD OF REVIEW CONCERNING REASONABLE SUSPICION TO STOP AND PROBABLE CAUSE TO SEARCH?

PARTIES TO THE ACTION BELOW

All parties are contained in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. THE STANDARD OF REVIEW HAS BEEN HISTORICALLY DEPENDENT UPON THE DESIGNATION OF APPELLATE ISSUE; I.E., FACT, LAW, OR MIXED QUESTIONS OF FACT AND LAW	14
A. FEDERAL HABEAS CLAIMS	19
B. CIVIL APPEALS	22
C. CRIMINAL APPEALS	23
D. THIS COURT HAS HISTORICALLY AND CONSISTENTLY APPLIED A *DE NOVO* STANDARD OF REVIEW TO LOWER COURTS' CONCLUSIONS OF PROBABLE CAUSE TO SEARCH AND REASONABLE SUSPICION TO STOP	25
II. THE TRADITIONAL FUNCTION OF APPELLATE REVIEW IN FOURTH AMENDMENT REASONABLE SUSPICION AND PROBABLE CAUSE TO SEARCH CASES REQUIRES APPELLATE COURTS TO APPLY A *DE NOVO* STANDARD OF REVIEW	30

TABLE OF CONTENTS – Continued

Page

A. SINCE FINDINGS OF PROBABLE CAUSE AND REASONABLE SUSPICION CONSTITUTE LEGAL CONCLUSIONS, A *DE NOVO* STANDARD OF REVIEW IS NECESSARY 30

B. MANDATING *DE NOVO* REVIEW IN NON-WARRANT CASES WILL REQUIRE THE LOWER COURTS TO FULFILL THEIR TRADITIONAL APPELLATE RESPONSIBILITIES OF JUDICIAL OVERSIGHT, ERROR CORRECTION, AND LAW DEVELOPMENT 33

III. THE CLEARLY ERRONEOUS STANDARD IN NON-WARRANT CASES IS CONTRARY TO THE POLICY OBJECTIVE ENUNCIATED IN *GATES* 36

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

Alabama v. White, 496 U.S. 325 (1990) 27, 28

Anderson v. Bessemer City, 470 U.S. 564 (1985) 15, 18

Ashcraft v. Tennessee, 322 U.S. 143 (1944) 20, 23, 24

Baumgartner v. United States, 322 U.S. 665 (1944) 16

Beck v. Ohio, 379 U.S. 89 (1964) 27

Blackburn v. Alabama, 361 U.S. 199 (1960) 20

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 23

Brewer v. Williams, 430 U.S. 387 (1977) 19

Brineger v. United States, 338 U.S. 160 (1949) 25, 26

Brown v. Allen, 344 U.S. 443 (1953) 11, 17

Carroll v. United States, 267 U.S. 132 (1925) 25

Commissioner v. Duberstein, 363 U.S. 278 (1960) 23

Cooter & Gell v. Hartmarx Corp., et al., 496 U.S. 384 (1990) 14, 18

Cuyler v. Sullivan, 446 U.S. 335 (1980) 18, 20, 31

Davis v. North Carolina, 384 U.S. 737 (1966) 20

Dayton Board of Education v. Brinkman, 443 U.S. 523 (1979) 23

Elkins v. United States, 364 U.S. 206 (1960) 26

Florida v. Rodriquez, 469 U.S. 1 (1984) 28

Florida v. Royer, 460 U.S. 491 (1983) 27

TABLE OF AUTHORITIES – Continued

Page

Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970) 23

Haynes v. Washington, 373 U.S. 503 (1963) 20, 24

Illinois v. Gates, 462 U.S. 213 (1983) ... 28, 36, 37, 38, 39

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 15, 23

Ker v. California, 374 U.S. 23 (1963) 25, 27

Lisenba v. California, 314 U.S. 219 24

Maggio v. Fulford, 462 U.S. 111 (1983) (per curiam) 21

Marshall v. Lonberger, 459 U.S. 422 (1983) 20, 21

Massachusetts v. Upton, 466 U.S. 727 (1984) 28

Michigan v. Chesternut, 486 U.S. 567 (1988) 35

Miller v. Fenton, 474 U.S. 104 (1985) ... 16, 17, 18, 20, 21

Minnesota v. Olson, 495 U.S. 91 (1990) 39

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 23

Neil v. Biggers, 409 U.S. 188 (1972) 20

New Jersey v. T.L.O., 469 U.S. 325 (1985) 26, 27

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 23

Nix v. Williams, 467 U.S. 431 (1984) 8

Patton v. Yount, 467 U.S. 1025 (1984) 18, 19, 21

Pierce v. Underwood, 487 U.S. 552 (1988) 16, 18, 19

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 16, 23

Reid v. Georgia, 448 U.S. 438 (1980) 26, 27

TABLE OF AUTHORITIES – Continued

Page

Rushen v. Spain, 464 U.S. 114 (1983) 21

St. Amant v. Thompson, 390 U.S. 727 (1968) 23

Salve Regina College v. Russell, 499 U.S. 225 (1991) 18, 22, 33, 34

Sibron v. New York, 392 U.S. 40 (1968) 27

Stone v. Powell, 428 U.S. 465 (1976) 13, 41

Strickland v. Washington, 466 U.S. 668 (1984) 19

Sumner v. Mata, 455 U.S. 591 (1982) 20

Thompson v. Keohane, 64 U.S.L.W. 4027 (U.S. 11/28/95) ..... *passim*

Townsend v. Sain, 372 U.S. 293 (1963) 11, 17, 31

Trupiano v. United States, 334 U.S. 699 (1948), [*overruled in part by United States v. Gypsum Co. Inc.*, 333 U.S. 364 (1948) *United States v. Rabinowitz*, 339 U.S. 56 (1950)] 15

United States v. Cortez, 449 U.S. 411 (1981) 28

United States v. Garcia, 897 F.2d 1413 (7th Cir.) 8

United States v. Gates, 462 U.S. 213 (1983) 13, 28, 36-39

United States v. Ismael Ornelas-Ledesma & Saul Ornelas, 16 F.3d 714 (7th Cir. 1994) 1

United States v. Ismael Ornelas-Ledesma & Saul Ornelas, 52 F.3d 328 (7th Cir. 1995) 1

United States v. Raddatz, 447 U.S. 667 (1980) 15, 40

United States v. Sharpe, 470 U.S. 675 (1985) 27

United States v. Sokolow, 490 U.S. 1 (1989) 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Spears, 965 F.2d 262 (7th Cir. 1992) 13, 37, 38, 40, 41

United States v. Ventresca, 380 U.S. 102 (1965) ... 28, 37, 39

United States v. Yellow Cab Co., 338 U.S. 338 (1949) 23

Wainwright v. Witt, 469 U.S. 412 (1985) 21

Withrow v. Williams, 113 S.Ct. 1745 (1993) 21

Wong Sun v. United States, 371 U.S. 471 (1963) 27

Wright v. West, 112 S.Ct. 2482 (1992) 18

STATUTES

Fed. R. Crim.P. Rule 11 18

Fed. R. Crim.P. Rule 11(2) 9

Fed.R.Civ.P. Rule 52(a) 22

28 U.S.C. §1291 33

28 U.S.C. §2254(d) 12, 19, 21, 30

First Amendment 22

Fourth Amendment ..... *passim*

Fourteenth Amendment 24

MISCELLANEOUS

Monaghan, *Constitutional Fact Review, 85 Colum, L.Rev. 279, 237, 1985* 17

Scalia, The Rule of Law as a Law of Rules, 85 University of Chicago L. Rev., 1175, 1180-81 (1989) 32

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 55-73) is reported. *United States of America v. Ismael Ornelas-Ledesma and Saul Ornelas*, 16 F.3d 714 (7th Cir. 1994), decided February 10, 1994. The court's post remand decision (J.A. 91-92) is unpublished. *United States of America v. Saul Ornelas, Ismael Ornelas Ledesma*, 52 F.3d 328 (7th Cir. 1995), decision and order dated April 18, 1995. The district court's initial opinion (J.A. 28-36) is unreported. The district court's post remand decision, (J.A. 85-90) is unpublished.

The magistrate judge's initial recommendation (J.A. 7-27) is unreported. The magistrate judge's post remand recommendation (J.A. 76-84) is unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit post remand decision is dated April 18, 1995.

A petition for *certiorari* was timely filed on July 17, 1995 and was granted on November 6, 1995. This Court is reviewing the decisions of the United States Court of Appeals for the Seventh Circuit, in a criminal case, by writ of certiorari, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioners were charged in a one-count indictment with possession with intent to distribute approximately 2,000 grams of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. (R.4.) Petitioners challenged the stop, whether there was consent to search, the scope of the search, the arrests and the statements. (R. 12) (R.[14]) (Bracketed numbers refer to docket numbers for Saul Ornelas). Evidentiary hearings were held over the course of four days.

The matter before the Court emanates from a suppression motion. Milwaukee County Sheriff's agents seized cocaine after obtaining consent to "look through" the vehicle, and after effectuating a more intrusive, partial vehicle dismantlement. (Tr. at 151) The reasonable suspicion for the stop consisted of the articulated facts as developed through the course of the suppression hearing below.

As Milwaukee County Sheriff's Detective Michael Pautz conducted drug interdiction activities at 8:30 a.m. in the morning of December 11, 1992, he observed a two-door 1981 Oldsmobile bearing California plates parked in front of Room 4 of the Suburban Motel, 4600 S. 27th St., Milwaukee, Wisconsin. (J.A. 9)

Pautz testified that he believed that older two door GM vehicles were often used to transport drugs, and viewed California, along with Arizona, Florida, Texas and New York, as source states for controlled substances. (Tr. at 62) (J.A. 9) Pautz also believed other older two door cars to be suspect. He further noted that even newer model Chryslers and Fords were deemed suspect. (Tr. at 63-64)

Pautz contacted his dispatcher to run a check on the plates. The dispatcher advised that the vehicle was listed to Miguel Ornelas of 830 North 16th Street, San Jose, California with an additional name of "Ledesma." (J.A. 9) At the time of the evidentiary hearing, Pautz was unsure whether the dispatcher indicated that the name "Ledesma" came before or after the name "Ornelas." (J.A. 10) At the time of the stop, however, he believed the last name to be "Ornelas." (Tr. at 105)

After speaking with the dispatcher, Pautz then spoke with the motel clerk who disclosed that at 4:00 a.m. that morning, an individual named Ismael Ornelas had checked into room 4 with another individual, without prior reservations, and was due to check out at 11:00 a.m. (J.A. 10)

Approximately 20 minutes after receiving the information from the dispatcher, Pautz's partner, Detective Don Hurrle, arrived. Pautz called the Milwaukee DEA office and asked for a Narcotics and Dangerous Drug Information Systems, (hereinafter referred to as NADDIS), check on the names "Ismael Ornelas and Miguel Ledesma Ornelas." (J.A. 10) The check was made

by car phone with all the information being relayed verbally.

A short time later, Pautz was advised that both names appeared on NADDIS and was given the following information: "Miguel Ledesma Ornelas, also known as Miguel Ledesma-Lemus, with a date of birth of September 29, 1945, 5'6", 150 pounds, Hispanic male was a heroin dealer from El Centro, California; Ismael Ornelas, Jr., from **Tucson, Arizona** was a 1,000 kilogram a month cocaine dealer." (Tr. at 35) (Emphasis added) Pautz was not familiar with the geography of California and did not know that San Jose and El Centro, California are 600 miles apart. (J.A. 10)

There were no wants or warrants for either name listed in the NADDIS. (J.A. 58) Pautz stated, "And these were just names that we had received. Not necessarily the people that could have been in the room." (Tr. at 35) Pautz was asked if he checked the DOB of the registered owner of the car to determine whether it matched the DOB which had been received from NADDIS. He responded, "I didn't have the date of birth. Or I would have done it." (Tr. at 57) He was then asked if he attempted through his dispatcher to get the DOB of the registered owner of the car. He responded, "All 50 states are different, and I didn't call, have them call California because I didn't think that they could get that information from California, and I don't know that they could today." (Tr. at 58)

Detective Hurrle was similarly asked what he did to determine if the registered owner of the car and the NADDIS hit were the same person, in that one person

was from San Jose and the other from El Centro. He responded, "Nothing. We didn't know his date of birth at the time." (Tr. at 327)

Sergeant Robert Wiggins, of the Milwaukee County Sheriff's Department, who was in charge of the communications bureau, second shift, testified that his bureau routinely runs Department of Motor Vehicle computer checks using state license plate numbers to obtain the owner's name, residence, and the make of car to which the license is listed.

In response to a request by the defense in preparation for the suppression hearings, he ran the license plate on the 1981 Oldsmobile in question and found it registered to Miguel Ornelas, also known as "Ledesma Miguel Ornelas." He also received the date of birth and other identifying information for the registered owner of the Oldsmobile by running a second "administrative" request (J.A. 16) The registered owner had a date of birth of September 19, 1963. (Tr. at 362)

At the hearing, Wiggins affirmed that "All the police officers on the street know about the system and know how it's used, and use it on a regular basis." (Tr. at 358)

Deputy Sheriff Gil Pagan testified that the vast majority of persons of Spanish descent who use the last names of their parents, use the father's name first, followed by the mother's maiden name. Pagan confirmed that the sheriff's department "never made any attempts to train their officers as to this potential problem." (Tr. at 291)

Of further interest was the fact that the officers recovered the certificate of title from the car. The name on the certificate was "Ornelas, followed by the word Miguel, followed by the word Ledesma." (Tr. at 291) According to Pagan, the person's name would be Miguel Ornelas Ledesma. (Tr. at 292)

Shortly after obtaining the information from NADDIS, Detective Lyle Luedke and his drug sniffing dog were summoned. Pautz testified, "It was not necessarily our intent to use the dog. We merely wanted to have that dog available." The officers saw nothing unusual during the surveillance. (Tr. at 330)

At about the expected time of departure, Luedke and Hurrle observed two people exit room 4. One individual loaded the trunk with luggage. (Tr. at 305) A few minutes later both men got into the car. The officers then moved their own vehicles to either side of the suspect vehicle. (Tr. at 306)

Hurrle identified himself and requested identification of both individuals. Saul Ornelas produced a California driver's license and Ismael Ornelas-Ledesma gave a license showing an address of 3979 Alhamra Avenue, Martinez, California, 94553. Ismael Ornelas-Ledesma said they had just gotten in from California. (J.A. 12).

Hurrle retained possession of the licenses of both individuals. (J.A. 12) Hurrle then asked if they were in possession of any contraband or drugs. Both "responded almost simultaneously, they had nothing illegal or anything like that." (J.A. 12) Hurrle asked if he "could look through the vehicle," and the driver said "sure." (Tr. at 151)

While Luedke was searching the interior, Saul Ornelas "started to walk away, 15, 20 feet towards the motel office and I [Hurrle] asked him where he was going, and would he please come back. And he complied, came back to the car." (Tr. at 310)

Hurrle searched the trunk area and luggage with negative results. Luedke then searched the car's interior. While searching the interior rear passenger side armrest area, Luedke testified:

> I discovered that a portion of that panel approximately ten inches by six inches appeared to be or didn't appear but physically felt like it was somewhat loose. . . . I considered it was a possibility that panel had been removed and there could be something concealed in that area.
>
> I then went to the vent area of the right rear quarter panel. That would be the area just outside of the passenger area where there's a small plastic vent cover. I then looked at the vent cover. . . . I noticed a chrome colored Phillips screw, and a closer examination of that screw indicated that there was rust in the area of the Phillips head of the screw. . . . It indicated to me that that screw had been taken out at some time. . . .
>
> I then used a small pocket type knife to remove the Phillips screw from the plastic cover, I then looked into the area of the right rear quarter panel. . . .

(Tr. at 155-56)

Luedke claimed to have seen the top portion of a bag. Reaching in, he felt a hard block substance later found to

be cocaine. Upon examining the bag's contents, petitioners were handcuffed and arrested. (Tr. at 158)

Luedke never asked permission of either petitioner to remove the screw. (Tr. at 172)

At the hearing, Petitioners requested the government to produce the screw. It was brought to court and examined by the magistrate judge. The findings were as follows: "Let me say the Court also has examined the screw, and the Court could see no evidence of rust in there." (Tr. at 424)

The magistrate judge's recommendations included the findings that there was reasonable suspicion to stop and that the petitioners were seized within the meaning of the Fourth Amendment. However, the magistrate judge found that the consent to search, given by the Petitioners, did not allow the officers to dismantle parts of the car to search for drugs, citing *United States v. Garcia*, 897 F.2d 1413, 1419-20 (7th Cir. 1990). (J.A. 20, 21)

The magistrate judge opined that the: "record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband." (J.A. 22) His ultimate conclusion was that there was "not probable cause to dismantle the panel." (J.A. 22) Nonetheless, the court denied the motion to suppress, noting that the drugs would have been inevitably discovered, citing *Nix v. Williams*, 467 U.S. 431 (1984). (J.A. 22, 25)

The district court, although not relying on the inevitable discovery theory, found there was reasonable suspicion to stop and that probable cause existed to search the car's body cavity. (J.A. 33-34) The court noted that the

NADDIS check was for a person whose two last names were reversed from the proper last name of the car's owner. The court reasoned that those "discrepancies as a basis for defeating probable cause introduces requirements of certainty and absolute correctness into the analysis that were expressly proscribed by the Supreme Court on *Brown v. Texas*." (J.A. 34, n.3)

The trial court also denied petitioners' request to have a joint inspection of the car at the courthouse in order that an examination of the alleged loose panel could be conducted. (J.A. 43) Petitioners entered guilty pleas reserving their right to appeal under Fed. R. Crim. P. 11(2).

The United States Court of Appeals for the Seventh Circuit rejected petitioners' contention that the correct standard of review for determinations concerning the stop and search was *de novo*. "Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; . . . " (J.A. 65)

The court also held the clear error standard of review should apply to probable cause determinations. (J.A. 68)

It characterized the courier profile as "only a little better than a dragnet for Hispanics." (J.A. 61) It reversed, because it found that the trial court could not have properly believed that the panel was loose without having either heard the testimony, inspected the car, or asked the magistrate for a specific credibility determination.

The court remanded for a specific determination whether the panel was loose. (J.A. 72-73) It held that if

the testimony of Luedke was found not to be credible, the motions to suppress should be granted. The court specifically noted "that the interior of a 1981 Olds unlike that of a Rolls Royce is apt to be rather worn and battered after eleven years." If credible, the trial court would have to determine whether the somewhat loose panel on an eleven-year-old car could transform reasonable suspicion into probable cause. (J.A. 69-70)

Upon remand, the trial court referred the remanded issue to the magistrate judge who determined that "except for the rule of *Falsus In Uno Falsus In Omnibus*, I have no reason not to believe the panel was loose." (J.A. 79) The magistrate again concluded that there was not probable cause (J.A. 80) on the basis of the somewhat loose panel, coupled with the "questionable drug courier profile," (J.A. 79) and the "convoluted and mismatched NADDIS reports". (J.A. 80)

On appeal by the Government, the district court disagreed with the magistrate and denied the motions to suppress. (J.A. 85-90) Again Petitioners instituted a second appeal arguing that *de novo* was the correct standard of review. (Main brief, filed 11-17-94, at pp. 2-6). The court of appeals' two-page order reaffirmed that its review was deferential. "The district court's finding of probable cause may be set aside only if clearly erroneous. We do not find clear error . . . " (J.A. 92)

SUMMARY OF THE ARGUMENT

1. Appellate courts apply varying standards of review which are dependent upon whether the issue designated as one of fact, a mixed question of fact and law, or of law. Courts frequently quote *Brown v. Allen*, 344 U.S. 443, 506 (1953) for its definition of issues of fact as being "basic, primary, or historical fact: facts in the sense of a recital of external events and the credibility of their narrators." In *Townsend v. Sain*, 372 U.S. 293, 306 n.6 (1963), the Court stated, "So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense."

Once a designation of the issue as being one of fact is made, the clearly erroneous standard of review is employed. If the designation is one of law, a *de novo* review will be afforded. Mixed questions of fact and law have been generally reviewed *de novo*. The exceptions typically involve cases where the trial court is uniquely situated to evaluate credibility, demeanor, and local concerns. As such, it is said the trial court is in a better position than the appellate court to correctly determine the issue. Questions of intent to discriminate, competency to stand trial, and juror impartiality are some areas where this Court has found that deference to the trial court is warranted.

2. Historically, in the area of search and seizure, this Court has consistently applied the *de novo* standard of review. This Court has examined *de novo* appeals on direct review of state court decisions, review of lower federal courts, and habeas review of state court decisions.

Such *de novo* reviews are generally conducted with an independent assessment of the basic facts, while giving appropriate deference to credibility determinations.

3. This Court recently, in *Thompson v. Keohane*, 64 U.S.L.W. 4027 (U.S. 11/28/95), had occasion to review whether, for *Miranda* purposes, a person was "in custody." The lower federal courts held that the state court's determination that the person was not in custody was a question of fact, which merited the presumption of correctness under 28 U.S.C. § 2254(d). This Court held that the person was "in custody". An "in custody" determination was one which required the application of a set of historical facts to an objective legal standard. The ultimate question which necessitated a weighing of the "totality of the circumstances", was a question for independent review.

To determine if a person is "in custody", the court must evaluate whether a reasonable man would believe he was in custody. When trial judges engage in this type of decisionmaking process, they do so with a view to identifying recurrent patterns and advancing uniform outcomes. It is this process, through which the law is developed and refined. An "in custody" determination was deemed to be that type of issue of law which merited plenary review.

In the context of search and seizure, trial courts engage in the same process of applying a given set of facts to a "reasonable man" objective standard. In doing so, they balance whether the officer acted "reasonably" by using probable cause as the pivot between competing

interests of effective law enforcement and individual privacy interests. This process advances and refines the development of the law. Appellate courts also conduct reviews of lower court determinations with an eye for law development.

Probable cause, being of Constitutional origin, is by its very nature, a legal question as opposed to a finding of mere historical fact.

4. The Seventh Circuit's announcement in *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992), that it would treat warrant and non-warrant cases under a uniform standard of review, to wit: (clearly erroneous), ignores and undermines the rationale in *United States v. Gates*, 462 U.S. 213 (1983). In *Gates* this Court announced that in warrant cases, a trial court would be applying a more deferential standard of review, to wit: the "substantial basis" test to the magistrate's determination whether there was probable cause to issue a warrant. It did so with the expressed intent of creating an incentive for the officer to employ the warrant process, which this Court has repeatedly stated it prefers.

A deferential review ignores the underlying basis for limiting habeas review in state court search and seizure issues. In *Stone v. Powell*, 428 U.S. 465 (1976), this Court limited habeas review of state search and seizure claims by habeas corpus. It did so because it believed that the defendants had been accorded a full and fair opportunity to adjudicate their Fourth Amendment claims both at the trial court and upon review in state appellate courts. In the case at bar, the clearly erroneous standard denies the Petitioners their right to a full and fair review.

5. Mandating *de novo* review by appellate courts, will effectively force trial court judges to carefully make written findings and conclusions in federal court cases. Plenary review allows both the trial and appellate courts not merely to determine the correct legal outcome, but also to shape and enhance the development of the law. This process has the benefit of guiding lower courts, as well as law enforcement officers in carrying out their duties of protecting Constitutional rights of the citizenry at large, and carrying out the often difficult task of law enforcement.

Plenary review fosters the traditional appellate responsibilities of judicial oversight and error correction. Independent appellate court examination is consistent with a system of checks and balances, inherent in a democratic society.

ARGUMENT

I. THE STANDARD OF REVIEW HAS BEEN HISTORICALLY DEPENDENT UPON THE DESIGNATION OF APPELLATE ISSUE; I.E., FACT, LAW, OR MIXED QUESTIONS OF FACT AND LAW.

The Supreme Court has previously distinguished *de novo* review from that which is conducted through implementation of the clearly erroneous standard. In *Cooter & Gell v. Hartmarx Corp., et al.*, 496 U.S. 384, 400-401 (1990), the clearly erroneous standard was defined in the following manner:

> In practice, the "clearly erroneous" standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. See, e.g., *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857-858 (1982).[1]

In *United States v. Raddatz*, 447 U.S. 667, 690 (1980), the Court stated "review *de novo*" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency.

The Court has considered the appropriate standard of review in a myriad of different contexts, including civil appeals, criminal direct appeals, and federal habeas claims. In large measure, this Court, absent specific legislative directive, has on its own, determined the appropriate standard by the way in which it characterizes the

---

[1] *See also, United States v. Gypsum Co., Inc.*, 333 U.S. 364, 394-395 (1948): "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

appellate issue. There have been four primary designations in this regard: historic fact, law, mixed questions of fact and law, and abuse of discretion. While the means by which the Court categorizes the individual issue is not clearly defined, the applicable standard of review is always dependent upon the designation assigned to the individual issue. Accordingly, a prerequisite to the actual review is that the Court must determine the appropriate category of each issue at bar. However, the process of categorizing the issue has not been historically easy for the Court. In *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), the Court described the particular difficulty which it encounters in differentiating between fact and law:

> The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. See *Baumgartner v. United States*, 322 U.S. 665, 671 (1944). Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.

See also, Pierce v. Underwood, 487 U.S. 552, 559 (1988). Similarly, in *Miller v. Fenton*, 474 U.S. 104, 112, 114 (1985), the problems inherent in the designation process are discussed.

Perhaps much of the difficulty in the area stems from the practical truth that the decision to label an issue a "question of law", a "question of fact", or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis.

See also, Monaghan, *Constitutional Fact Review,* 85 Colum, L. Rev. 279, 237 (1985).

The Court has, however, considered the means by which the distinction may be drawn between fact and mixed questions of law and fact. In *Townsend v. Sain*, 372 U.S. 293, 306 n.6 (1963) the Court, in reliance upon Justice Frankfurter's separate opinion, endorsed by a majority of the court in *Brown v. Allen*, 344 U.S. 443 (1953), provided the following test:

> By "issues of act" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators. . . . " *Brown v. Allen*, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. (emphasis added).

The Court noted that "beyond these elemental propositions, negative in form, the Court has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.' " *Miller v. Fenton*, 474 U.S. 104, 113 (1985).[2]

---

[2] The Court noted the following general principles applicable to the consideration of distinguishing fact from law: 1) " . . . an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question", *Dayton Board of Education*, 443 U.S. 523, 534 (1979), 2) The finding of intent to discriminate is subject to the clearly erroneous standard of review. *Pullman*, 456 U.S. at 288.

Once the Court finds that the subject of its scrutiny is one of fact, it will traditionally employ the clearly erroneous standard. The court in *Anderson* advised: "For these reasons, review of factual findings under the clearly-erroneous standard – with its deference to the trier of fact – is the rule, not the exception." *Anderson v. Bessemer City*, 470 U.S. at 564.

If the Court determines that the subject of review is a question of law, a *de novo* review will be afforded. *Salve Regina College v. Russell*, 499 U.S. 225, 231.

Mixed questions of law and fact have been historically examined through the regimen of a *de novo* review.[3] *Patton v. Yount*, 467 U.S. 1025, 1038 (1984), *Cuyler v. Sullivan*, 446 U.S. 345, 342 (1980), *Miller v. Fenton*, 474 U.S. 104 (1985), *Wright v. West*, 112 S.Ct. 2482, 2493-2498 (1992).

A lower court's exercise of discretion is afforded great deference and is reviewable to determine if an act

---

[3] In *Miller v. Fenton*, 474 U.S. 104, 114 (1985), this Court held, "Finally, we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is (better positioned) than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Miller v. Fenton*, 474 U.S. 104, 114 (1985); see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) ("[T]he district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11"); *Pierce v. Underwood*, 487 U.S. 552, 562 (1988) ("[T]he question whether the Government's litigating position has been 'substantially justified' is . . . a multifarious and novel question, little susceptible, for the time being at least, of useful generalization").

constitutes an abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

A. FEDERAL HABEAS CLAIMS.

When Congress enacted the federal habeas legislation, it attempted to limit the depth of inquiry by mandating implementation of 28 U.S.C. § 2254(d). That provision provides, *inter alia*, that, subject to certain enumerated exceptions, federal habeas courts shall accept as correct, the factual determinations made by the state court. The section does, however, permit a federal court to determine that a state finding was "not clearly supported by the record". *Patton v. Yount*, 467 U.S. 1025, 1038 (1984).

Generally, the "what happened" determinations, or factual issues warrant a presumption of correctness, but those ultimate determinations which present mixed questions of law and fact, the Court has declared, remain outside § 2254(d)'s domain, and is a matter of independent federal determination. *Thompson v. Keohane*, 64 U.S.L.W. 4027 (U.S. 11/28/95). The practical implementation of § 2254(d) requires that the reviewing court first conclude whether the appellate issue is one of fact, of law, or of mixed questions of fact and law. In *Brewer v. Williams*, 430 U.S. 367 (1977), the Court held that the deferential standard shall not be accorded to a challenge to a defendant's waiver to the right of counsel. Such issue, upon appeal, shall be accorded plenary review. In *Strickland v. Washington*, 466 U.S. 668 (1983), it was determined that the principles governing effective assistance of counsel claims apply in federal collateral proceedings.

Furthermore, an effective or ineffective assistance determination is not a finding of fact, but is, rather, a mixed question of law and fact. Accordingly, independent review is appropriate. In *Davis v. North Carolina*, 384 U.S. 737, 741 (1966), the court concluded:

> It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness. (Citing *Haynes v. Washington*, 373 U.S. 503, 515-516 (1963); *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960); *Ashcraft v. Tennessee*, 322 U.S. 143, 147-148 (1944).

See also, Miller v. Fenton, 474 U.S. 104 (1985).

In 1982 this court decided that the ultimate question whether a pretrial identification procedure was constitutionality impermissibly suggestive is a mixed question of fact and law which necessitated *de novo* review. *Sumner v. Mata*, 455 U.S. 591, 596-97 (1982).[4] Similarly, what constitutes voluntariness within the context of a guilty plea is subject to *de novo* review. *Marshall v. Lonberger*, 459 U.S. 431, 436-437, 442 (1983). The question whether counsel's representation of multiple defendants constituted ineffective assistance was deemed a mixed question of law and fact. *Cuyler v. Sullivan*, 466 U.S. 345, 341, 342 (1980). Most recently, it was determined that state courts "in custody"

---

[4] Previously however, the court in *Neil v. Biggers*, 409 U.S. 188, 200 (1972), applied the totality of the circumstances test in determining the suggestiveness of the identification procedure. It decided that the district court's conclusions on the critical facts were unsupported by the record and clearly erroneous.

rulings do not resolve factual issues and are, instead, mixed questions of law and fact. Independent review by the federal habeas court is thereby merited. *Thompson v. Keohane*, 64 U.S.L.W. 4027 (U.S. 11/28/95). *Withrow v. Williams*, 113 S.Ct. 1745, 1754 (1993).

When historical facts are the issues before the lower tribunal, 28 U.S.C. § 2554(d) applies, thereby necessitating the implementation of the clearly erroneous standard. Those cases in which § 2254(d)'s presumption of correctness applies are heavily dependent upon the trial court's ability to appraise witnesses' credibility and demeanor, *Keohane*, at 4030.

The factual issues to which § 2254(d)'s "presumptoin of correctness" applies, includes: *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam), (competency to stand trial);[5] *Wainwright v. Witt*, 469 U.S. 412, 429 (1985), (juror impartiality, *Patton v. Yount*, 467 U.S. 1025, 1036 (1984), (juror impartiality), *Rushen v. Spain*, 464 U.S. 114, 120 (1983), (juror impartiality). *See also, Miller v. Fenton* at 114:

> When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the

---

[5] The Court of Appeals on habeas review of the state court's determination of competency determined that the lower tribunal's decision was "not fairly supported by the record". *Maggio v. Fulford*, at p. 113. The Supreme Court, in reviewing the appellate decision, concluded that " . . . the Court of Appeals erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts – a prerogative which 28 U.S.C. § 2254 does not allow it". *Maggio v. Fulford*, p. 113 citing, *Marshall v. Lonberger*, 459 U.S. 422 (1983).

process of applying law to fact to the trial court and according its determinations presumptive weight.

B. CIVIL APPEALS.

The principle which establishes that the standard of review is outcome determinative of the category ascribed to the appellate issue has also been followed by this court in civil litigation. In *Salve Regina College v. Russell*, 499 U.S. 225 at 231, the Court concluded, " . . . a court of appeals should review *de novo* a district court's determination of state law. As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. See 28 U.S.C. § 1291."

Even in matters of civil litigation governed by Fed.R.Civ.P Rule 52(a), the Court has ruled that, in construing First Amendment issues, the following concept applies:[6]

> On the other hand, respondent correctly reminds us that in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field

[6] Fed.R.Civ.P. Rule 52(a) provides:
"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses".

> of free expression." *New York Times Co. v. Sullivan*, 376 U.S., at 284-286; *NAACP v. Claiborne, Hardware Co.*, 458 U.S. 886, 933-934 (1982); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 11 (1970); *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968).

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984).

Similarly, this court articulated in *Bose* at 501, Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or finding of fact that is predicated on a misunderstanding on the governing rule of law." *See also, Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 at 885, n.15 (1982).

Issues of intent have been scrutinized as factual matters and accordingly, subject to the clearly erroneous rule. *Dayton Board of Education v. Brinkman*, 443 U.S. 536, 534 (1979); *Commissioner v. Duberstein*, 363 U.S. 278, 286 (1960); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *Pullman-Standard v. Swint*, 456 U.S 273, 288 (1982).

C. CRIMINAL APPEALS

As in the previously described federal habeas decisions, the court has applied the fact, law, mixed question of fact and law construction in designating the appropriate standard of review for direct state and federal appeals. In *Ashcraft v. Tennessee*, 322 U.S. 137, 146-47 (1944), the Court while mandating an independent examination of a state court's determination regarding the voluntariness of an alleged confession, stated:

> This treatment of the confessions by the two state courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of "independent examination" of petitioners' claims which, in any event, we are bound to make. *Lisenba v. California*, 314 U.S. 219, 237-238.

In *Haynes v. Washington*, 373 U.S. 503 (1963), the Court was presented with the following issue: Was the court precluded from reviewing the voluntariness of a confession by the verdict of the jury, which by local state practice was entrusted with the determination of voluntariness? The response was a resounding no.[7]

---

[7] "Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue. It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an ***independent*** determination here, ***see e.g., Ashcraft v. Tennessee***, 322 U.S. 143, 147-148; "we cannot escape the responsibility of making our own examination of the record," *Spano v. New York*, 360 U.S. 315, 316. While, for purposes of review in this Court, the determination of the trial judge or of the jury will ordinarily be taken to resolve evidentiary conflicts and may be entitled to some weight even with respect to the ultimate conclusion on the crucial issue of voluntariness, we cannot avoid our responsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." ***Stein v. New York***, 346 U.S. 156, 181. *Haynes* at 515-516.

In *Ker v. California*, 374 U.S. 23 (1963), the Court held that standards of reasonableness under the Fourth Amendment are enforced against the states and the decisions of state courts which address the reasonableness of the search and seizure shall be subject to plenary review.

> While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental – *i.e.*, constitutional – criteria established by this Court have been respected. *Ker*, 374 U.S. at 34.

D. THIS COURT HAS HISTORICALLY AND CONSISTENTLY APPLIED A *DE NOVO* STANDARD OF REVIEW TO LOWER COURTS' CONCLUSIONS OF PROBABLE CAUSE TO SEARCH AND REASONABLE SUSPICION TO STOP.

The Court has consistently, in its review of warrantless search cases, espoused that *de novo* review is the applicable standard for appellate scrutiny. As early as 1925, this court applied the *de novo* standard in deciding the constitutional implications of probable cause, *Carroll v. United States*, 267 U.S. 132 (1925). *Carroll* presented the question whether probable cause existed for a vehicle search which resulted in the seizure of contraband. It is clear that the *Carroll* court had conducted an independent review of the issue at bar. In *Brineger v. United States*, 338 U.S. 160 (1949), the court again addressed whether arresting officers had probable cause to justify the resultant

seizure. The court in *Brineger* opined that the lower court's "finding[s]" or "conclusion[s]" concerning probable cause were "erroneous." *Brineger*, 338 U.S. at 171. *See also, Elkins v. United States*, 364 U.S. 206 (1960).[8]

The Georgia Court of Appeals in a 1980 decision determined that a stop was permissible because the subject fit a "drug courier profile". Upon conducting plenary review, in *Reid v. Georgia*, 448 U.S. 438, 441 (1980), this Court concluded " . . . that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances."

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court considered how and whether searches and seizures by public school officials were governed by the Fourth Amendment. This Court reversed the lower decision that the search of the child's purse was unreasonable. It did so after conducting an independent examination of the facts which resulted in a different legal conclusion. The *de novo* review in *T.L.O.* resulted in a reversal of the suppression order despite the fact that the state court's legal standard was "not substantially different from the standard" it has

---

[8] *Cf. Elkins v. United States*, 364 U.S. 206, 223-24 (1960), this Court States:
"In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have-countenanced, nor diminished by what another may have colorably suppressed."

adopted. *New Jersey v. T.L.O.*, at 342-343. (Reasonable grounds must exist to suspect that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.)

The Supreme Court has on other occasions conducted a *de novo* review in warrantless investigatory stops. *See also, Alabama v. White*, 496 U.S. 325 (1990) and *United States v. Sokolow*, 490 U.S. 1 (1989). (This court conducted its own analysis of the facts and circumstances and reversed the legal conclusion of the court of appeals.)[9]

In *Beck v. Ohio*, 379 U.S. 89 (1964), this Court, in an analysis of whether the record below supported a finding of probable cause for arrest, reiterated its holding in *Ker v. California*, that the reviewing court must make an independent examination of the facts and findings. *Beck*, 379 U.S. at 92. The *Beck* Court then did, in fact, conduct the independent examination to which it alluded, consistent with the requirements in *Ker*.

In *Alabama v. White*, 496 U.S. 325 (1990), the Court, in consideration of an anonymous tip, warrantless investigatory stop, took great pains to conduct a thorough examination of the facts. Without deference to the trial court's determination, it independently opined that the

---

[9] The court has reviewed *de novo* the existence of probable cause or suspicion in the following cases: *United States v. Sharpe*, 470 U.S. 675 (1985), (reasonable suspicion); *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion) (reasonable suspicion); *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam) (reasonable suspicion); *Sibron v. New York* 392 U.S. 40 (1968) (probable cause); *Wong Sun v. United States*, 371 U.S. 471, 480 (1963)

totality of the circumstances justified the stop. *White* at 332.

In 1981, this Court again in *United States v. Cortez*, 449 U.S. 411 (1981) engaged in an exhaustive consideration of the facts developed below. This decision was clearly premised upon a *de novo* review.[10] *See also, Florida v. Rodriguez*, 469 U.S. 1, 6 (1984). (A decision in which the Court conducted an independent examination whether there was articulated suspicion to justify a seizure whether the defendant or the state must prove that a consenting defendant knew that he had the right to withhold consent.)

Since 1983, the Court has been emphatic and consistent in applying a deferential standard in reviewing the appropriation of issuance of a warrant, to wit: is there a substantial basis to conclude that probable cause existed? *Illinois v. Gates*, 462 U.S. 213, 236, 237 (1983); *Massachusetts v. Upton*, 466 U.S. 727 (1984). *See also, United States v. Ventresca*, 380 U.S. 102 (1967).

The decisions which have emanated from the Supreme Court have, as noted above, developed guiding principles for the utilization of the appropriate appellate standard. The facts, law, mixed question characterization is the pivotal consideration in determining the scope of review. This Court has uniformly, through habeas, civil

---

[10] In *United States v. Cortez*, the Court considered a stop based upon articulable suspicion. Despite the clearly erroneous standard applied by the lower courts, this Court, on appeal, engaged in a *de novo* review. The Court implicitly rejected the clearly erroneous standard which was applied by the lower courts.

appeals, and direct criminal appellate review, either expressly or inferentially, applied a *de novo* review for that determination. Those opinions which address the reasonableness of a warrantless arrest or search have unfailingly ascribed to fact/law principle. There is no justifiable reason to deviate from the traditional and long recognized process as previously described herein, in the instant action. The facts and circumstances giving rise to the appeal at bar are precisely those which this court has historically construed as necessitating plenary review. While ample other independent justification exists for affording a *de novo* analysis on appeal, this Court ought to conduct an independent review to maintain the integrity and consistency of the appellate standards which it has heretofore established and to which it has historically adhered.

The Seventh Circuit decision in *United States v. Ornelas* mistakenly employs the clearly erroneous standard.[11]

---

[11] Had the appeals court refrained from according deference to the decision below, and instead conducted its own independent analysis, the result would have been reversed. The seized contraband would have been suppressed.

II. THE TRADITIONAL FUNCTION OF APPELLATE REVIEW IN FOURTH AMENDMENT REASONABLE SUSPICION AND PROBABLE CAUSE TO SEARCH CASES REQUIRES APPELLATE COURTS TO APPLY A *DE NOVO* STANDARD OF REVIEW.

A. SINCE FINDINGS OF PROBABLE CAUSE AND REASONABLE SUSPICION CONSTITUTE LEGAL CONCLUSIONS, A *DE NOVO* STANDARD OF REVIEW IS NECESSARY.

In a newly announced Fifth Amendment case, *Thompson v. Keohane*, 64 U.S.L.W. 4027 (U.S. 11/28/95) this Court was presented with the question "whether state-court 'in custody' determinations are matters of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d), or mixed questions of law and fact warranting independent review by the federal habeas court." *Thompson* (64 U.S.L.W. 4031). The state trial and appellate courts found that Thompson was not in custody when he confessed.

Thompson filed a petition for a writ of habeas corpus in the United States District Court for the District of Alaska. That court denied the writ and accorded the presumption of correctness under 28 U.S.C. § 2254(d) to the state courts' findings that Thompson was not in custody for *Miranda* purposes when he made the confession. The reviewing federal court agreed.

This Court found that "the issue whether a suspect is 'in custody,' and therefore entitled to *Miranda* warnings, presents a mixed question of law and fact qualifying for independent review." *Thompson* (64 U.S.L.W. 4027). In so doing, the Court initially had to define "issue of fact." It

looked to *Townsend v. Sain*, 372 U.S. 293 (1963), which provided the foundation for § 2254(d).

This Court stated, citing *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980), " 'the ultimate question' – requiring a 'totality of the circumstances' assessment – 'is a matter for independent federal determination.' " *Thompson* (64 U.S.L.W. 430). As noted in an earlier section of this brief, a number of exceptions to this general rule exist, which are premised upon the superior ability of the trial court to correctly decide the ultimate issue. These often involve issues of credibility of witnesses and first hand observations by the trial court. Thus, the error correcting functions of appellate review are limited.

When applying a uniform objective standard to a set of historical facts, a legal conclusion emerges. In *Keohane*, respondents argued that "reasonable person" assessments, a determination which must be made in a negligence action and which is most prominently in the field of torts, remains with the finder of fact. This Court stated, in n.13, that the fundamental difference in the assessment of a "reasonable person" determination and the assessment of whether someone is in custody, is that the latter is done "with a view to identifying recurrent patterns, and advancing uniform outcomes. If they cannot supply 'a definite rule' they nonetheless can reduce the area of uncertainty."

Further, in most tort actions, the finder of fact is not developing the law. The *Keohane* Court concluded that " . . . the crucial question entails an evaluation made after determination of those circumstances: if encountered by a 'reasonable person,' would the identified circumstances

add up to custody as defined in *Miranda*?" *Keohane* (64 U.S.L.W. at 4031). It is this valuative process, which serves the purpose of furthering the development of the law and which makes the issue of custody a legal determination and not fact.

By classifying the question as one subject to plenary review, legitimate law enforcement interests are served because "the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law." *Keohane* (64 U.S.L.W. at 4032).

The Fourth Amendment probable cause and reasonable suspicion cases similarly employ a reasonable man standard. The policy reasons why the "in custody" determination should be subject to plenary review, apply with equal force in the Fourth Amendment context. Foremost, it is in the exercise of judgement, where appellate courts apply a given set of facts to the Constitutional norms, weigh the relative values of those norms against the imperatives of effective law enforcement, and articulate a rule or set of rules to guide future behavior.[12]

---

[12] Justice Scalia, in *The Rule of Law as a Law of Rules*, 85 University of Chicago L. Rev., 1175, 1180-81 (1989), "suggest[s] that when an appellate judge comes up with nothing better than a totality of circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding." He applies this analysis to the law of torts and the reasonable man standard.

Pressing further, Justice Scalia asks, at 1181: "Why should the question whether a person exercised reasonable care be a question of fact, but the question whether a search or seizure was reasonable be a question of law? The latter, like the former, lends itself to ordination by rule *up to a point*." One answer,

B. MANDATING *DE NOVO* REVIEW IN NON-WARRANT CASES WILL REQUIRE THE LOWER COURTS TO FULFILL THEIR TRADITIONAL APPELLATE RESPONSIBILITIES OF JUDICIAL OVERSIGHT, ERROR CORRECTION, AND LAW DEVELOPMENT.

Salve Regina College v. Russell, 499 U.S. 230 (1991) mandated federal appellate courts to review *de novo* a district court's determination of state law. Citing 28 U.S.C. §1291, the *Russell* Court noted that, as a general rule, courts of appeal have plenary authority over decisions of district courts. The Court also stated, "Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Russell*, 499 U.S. at 231.

The Court fully recognized that trial courts preside alone over fast-paced trials, and are occupied by the exigencies of conducting trials. Similarly, the "logistical burdens of trial advocacy" limit trial counsel's abilities to supplement the trial court's own research with briefs. *Russell*, 499 U.S. at 231. The Court acknowledged that

---

Justice Scalia suggests, is that juries cannot be trusted to make the determination of whether the search was reasonable when the defendant is obviously guilty. "Perhaps, then, the answer is that 'reasonable search' is a *constitution* standard, and whether such a standard has been met *must* be left to the judges." *Id.* at 1182. He does not know why some questions are treated as fact and others as law. " . . . [T]hough I imagine that their relative importance to our liberties has much to do with it." *Id.* at 1182.

Not unlike this Court's decision in *Keohane*, Justice Scalia suggests "the establishment of broadly applicable general principles is an essential component of the judicial process." *Id.* at 1185.

trial courts "often must resolve complicated legal questions without benefit of 'extended reflection [or] extensive information.' " *Id.* at 232.

The *Russell* Court, at 232, stated that appellate courts are "structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to the legal issues." With further and more refined briefing, a fuller analysis will emerge than that which was in the trial court. "Perhaps most important, courts of appeals employ multijudge panels . . . that permit reflective dialog and collective judgment." *Russell*, 499 U.S. at 232.

Not only does *de novo* review often promote decisional accuracy making at the appellate level, such application "should encourage a district court to explicate with care the basis for its legal conclusions." *Russell*, 499 U.S. at 233.

Appellate courts are far more likely to have a keener appreciation for the more subtle aspects of fairly complicated Fourth Amendment jurisprudence by virtue of the fact that legal reviews are their principal function. Case by case evaluation of closely related fact situations allows appellate courts to develop the law, describe limits, and guide lower courts and law enforcement authorities. This Court has looked at a number of cases involving airport and border searches in an attempt to develop a national policy to address a national problem of drug importation and illegal immigration.

Further, the development of objective standards, that is, what a reasonable person would believe, "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988).

Plenary review fosters the orderly development of the law, by reducing conflicting decisions of lower courts. It promotes consistency and uniformity in law development. Since this Court hears only a small fraction of the cases which are heard by federal courts of appeal, the lower appellate tribunals are relegated the primary responsibility of delineating with particularity, the confines of specific Fourth Amendment issues. It is therefore important that lower appellate courts have direction from this Court in exercising their collective judgment in defining and declaring Fourth Amendment jurisprudence. As a corollary, it is essential that lower appellate courts have the independence to exercise their appropriate appellate responsibilities.

The development of the law can be best served when the focus of appellate review is upon the reasonableness of the particular conduct which gives rise to the search or seizure. It is far less productive for the development of consistent and predictable applications of the law, to have the appellate analysis emphasis a means by which to establish some basis for sustaining the decision below.

To adhere to a clearly erroneous standard of review in non-warrant cases would produce the anomalous result of a lone trial judge exerting its view of Fourth Amendment law upon the collective wisdom of three panel appellate courts, if there is some basis to sustain

the decision. Indeed, the appellate courts may well have decided the case differently. While a clearly erroneous standard of review is appropriate for factual findings, there is no considered justification for this standard in search and seizure legal determinations.

Deferential review of legal issues, especially in the search and seizure context, is contrary to one of the central values of a democratic society. Decision-making should be subject to full and meaningful checks and balances. If it is not, it is akin to a tyranny of mediocrity.

The constitutional core values, implicit in the concept of probable cause, require the protections which plenary review fosters.

III. THE CLEARLY ERRONEOUS STANDARD IN NON-WARRANT CASES IS CONTRARY TO THE POLICY OBJECTIVE ENUNCIATED IN *GATES*.

Illinois v. Gates, 462 U.S. 213 (1983) abandoned the two-pronged test concerning an informant's veracity and reliability and reaffirmed the totality of the circumstances test as the basis for the issuance of a warrant. *Gates* noted that warrants are often drafted by non-lawyers in the midst and haste of a criminal investigation. Such persons do not keep abreast of each judicial refinement of the nature of probable cause. The Court stated that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232.

The rule which the *Gates'* decision pronounces was that: "after-the-fact scrutiny by courts of the sufficiency of the affidavit should not take the form of *de novo* review." *Gates*, 462 U.S. at 236. The *Gates* Court reaffirmed, at 212, that there should not be "A grudging or negative attitude by reviewing courts toward warrants," citing *Ventresca*, 380 U.S., at 108. Failure to give deference is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Gates*, 462 U.S. at 236.

The *Gates* Court gave further evidence of its intent to give deference to the magistrate's decision when the officer makes a determination to apply for a warrant. "Reflecting this strong preference for the warrant process, the traditional standard of review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Gates* at 236. This standard "serves the purpose of encouraging recourse to the warrant procedure . . . " *Gates*, 462 U.S. at 237.

In *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992), the United States Court of Appeals for the Seventh Circuit announced that it would apply the clearly erroneous standard of review to both warrant and non-warrant cases. *Spears* was cited as the basis for applying the clearly erroneous standard in this case. (J.A. 68) The rationale in *Spears*, at 270-71, was as follows:

> It would be anomalous to require a more searching review of a district judge's probable cause

> determination, made after a full adversary proceeding . . . Because there is little to distinguish a magistrate's probable cause determination in a warrant case and a district judge's probable cause determination in a nonwarrant case, appellate review should be the same for both. In warrant cases, the magistrate is the front-line judicial officer making the initial determination. In non-warrant cases, it is the district judge who makes the initial determination, who asks the same question the magistrate asks in a warrant case: is there probable cause . . . If there is probable cause, the scope of the search without a warrant is no greater than one with a warrant . . . It is the frontline officer in both cases who conducts the initial inquiry, who concludes there is or there is not probable cause, and an appellate panel should not substitute its judgment in either case.

In announcing that the standard of review in warrant and non-warrant should be the same, the *Spears* court ignored the essential rationale in *Gates*, which was to promote the warrant process. The *Spears* panel justified this decision, in part, by asserting that the scope of the search with or without the warrant would be the same. This analysis ignores a practical premise historically espoused by this Court, that the magistrate is a gatekeeper, to prevent unwarranted Fourth Amendment intrusions. More particularly, the magistrate serves to screen applications for warrants which fail to articulate probable cause; limit the scope of the proposed search; and prescribe the terms and conditions upon which such search shall be carried out.

Those two factors reflect this Court's long stated belief that the magistrate should stand between the police officer's zeal in law enforcement and the privacy interests of the individual to be free from arbitrary police conduct. *Gates* rewards the officer who took the time to secure the warrant by reaffirming, "resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," citing *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

Further, this Court has recognized that once a warrant is procured, intrusion upon interests protected by the Fourth Amendment are less severe. *Gates*, 462 U.S. at 237 n.10. By making the standard of review the same for warrant and non-warrant cases, the *Spears* court seriously erodes the incentive to procure the warrant by police and prosecutors.

The *Spears* court also justified its decision by listing other areas in which it has applied the clearly erroneous standard. The list included exigent circumstances, citing to a 1991 Seventh Circuit case. *Spears*, 965 F.2d at 271. This reliance is similarly misplaced. In *Minnesota v. Olson*, 495 U.S. 91, 100 (1990), the Court conducted a *de novo* review involving a "fact-specific application of the proper legal standard" to the question whether exigent circumstances existed.

There was no deference in *Olson* to the lower court's legal finding despite that independent review resulted in affirmance of the decision below. The *Spears* decision, which places emphasis on the district court's position as a front line adjudicator during the conduct of a probable

cause hearing, is inconsistent with the practical functioning of many federal jurisdictions. In various districts, a suppression hearing is conducted entirely before the magistrate-judge. The district court often hears none of the testimony, although may review the recommendations *de novo* upon petition by either party. This Court has stated, however, that such a *de novo* "determination" may be made merely upon a review of the record, that is, the filed objections and transcripts. The trial court is not obligated to have the witness appear before it to resolve disputed facts or credibility concerns. *Raddatz*, 447 U.S. 667 (1980).

In the instant action, deference is particularly undesirable given that the trial court twice overruled its magistrate's recommendation of no probable cause. Further, the district judge overruled the magistrate's findings which resulted from four days of hearings. The district judge, in its initial review of the magistrate's decision, failed to obtain the complete transcripts of the hearing. Instead, it relied upon a single transcript of Deputy Luedke. (J.A. 29, n.1) (R.44, 45, 46, 47). The full transcripts were not filed until late June, 1993, more than three months after the trial court denied petitioners' motions to suppress). Without question, the district court failed to consider the totality of the circumstances. It accordingly failed in its duty to "decide such motion based on the record developed before a magistrate . . . " *United States v. Raddatz*, 447 U.S. 667, 669 (1980).

In *Spears*, four judges dissented from the denial of a rehearing en banc. In a strongly worded opinion, the dissenters pointed out that the newly created clearly erroneous rule was not applied at the urging of any party and

was made without the benefit of briefing or oral argument. The dissent noted that in warrant situations, application of clearly erroneous standard will "weaken the fabric of *Gates* and *Leon*." *Spears*, 965 F.2d at 283. Finally, the divergent view argued that this approach forsakes the appellate courts' responsibility to interpret and uphold the Constitution.

The *Spears* court also ignored the rationale in *Stone v. Powell*, 428 U.S. 465 (1976), which limited habeas review by state court defendants in search and seizure claims. *Powell* precluded habeas review "by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct appeal." *Powell*, 428 U.S. at 486. It is self evident that the presumption in the limitation for state search and seizure habeas applications is that the defendant has had "a full and fair consideration" of the issue both at trial and on appeal. Any less than a *de novo* review would deny the litigant the full and fair consideration to which the Court alluded to in *Powell*.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed and the case remanded to that court for a proper determination of petitioners' suppression motions under the *de novo* standard of review.

Respectfully submitted,

ROBERT G. LEBELL*
STYLER, KOSTICH, LEBELL
DOBROSKI & MCGUIRE
100 East Wisconsin, Suite 1700
Milwaukee, WI 53202-4114
(414) 276-1233

Counsel for Petitioner
Saul Ornelas

BRIAN W. GLEASON
230 W. Wells Street
Suite 702
Milwaukee, WI 53203
(414) 277-5076

Counsel for Petitioner
Ismael Ornelas-Ledesma

* *Counsel of Record*

No. 95-5257

Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals, accepting as not clearly erroneous the facts the district court found, was required to review de novo the district court's conclusion that those facts provided reasonable suspicion justifying an investigatory stop and probable cause to search.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-5257

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals affirming petitioners' convictions (J.A. 91-93) is unreported, but the judgment is noted at 52 F.3d 328 (Table). The earlier opinion of the court of appeals vacating the convictions and remanding for further proceedings (J.A. 55-73) is reported at 16 F.3d 714. The recommendations of the magistrate judge (J.A. 7-27, 76-84) and the opinions of the district court (J.A. 28-36, 74-75, 85-90) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1995. The petition for a writ of certiorari was filed on

July 17, 1995, and was granted on November 6, 1995 (J.A. 94). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After entering conditional guilty pleas in the United States District Court for the Eastern District of Wisconsin, petitioners were convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Ornelas-Ledesma was sentenced to 60 months' imprisonment and petitioner Ornelas was sentenced to 63 months' imprisonment, each term to be followed by four years' supervised release. J.A. 4-5, 45-46, 48-51. On petitioners' appeal from the denial of their motion to suppress cocaine found behind a side panel in their car, the court of appeals vacated the judgments of conviction and remanded for further proceedings. J.A. 55-73. On remand, the United States magistrate judge recommended that the motion to suppress be granted, J.A. 76-84, but the district court sustained the government's objection to the magistrate judge's recommendation and denied the suppression motion, J.A. 85-90. The court of appeals affirmed. J.A. 91-93.

1. The facts are undisputed.[1] On December 11, 1993, Detective Pautz of the Milwaukee County Sheriff's Office was making a routine survey of the motels along South 27th Street in Milwaukee, Wisconsin, looking for drug trafficking activity. In one of the motel parking lots he spotted a 1981 two-door Oldsmobile with a California license plate. Based on his training and experience in drug interdiction, Pautz knew that narcotics traffickers often use older two-door General Motors cars because it is easy to conceal drugs in them, and that California is a "source" State from which drugs are shipped to other States. J.A. 9, 56. Pautz radioed his dispatcher to find out to whom the car was registered. The dispatcher responded either that the registered owner of the car was Miguel Ledesma Ornelas or Miguel Ornelas Ledesma; Pautz was unsure whether the dispatcher indicated that the name "Ledesma" came before or after the name "Ornelas." J.A. 9-10, 56-57.

Believing that he had the name of the car's registered owner, Detective Pautz entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas and another man had registered at 4:00 a.m. without reservations. Pautz called for his partner, Detective Hurrle, to join him at the motel parking lot. After Hurrle arrived, the two officers asked the local office of the federal Drug Enforcement Agency

---

[1] The facts in this statement are drawn from the factual findings of the magistrate judge, J.A. 9-13, 79, as adopted by the district court, J.A. 28, 86, and affirmed by the court of appeals, J.A. 56-59, 92.

(DEA) to run a check, through its Narcotic and Dangerous Drug Information System (NADDIS), on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas.[2] NADDIS reported two "hits," i.e., records of known or suspected criminal activity. One identified Miguel Ledesma Ornelas (also known as Miguel Lemus-Ledesma), a 48-year-old Hispanic male, five feet six inches tall and weighing 150 pounds, as a suspected heroin dealer from El Centro, California. The other identified Ismael Ornelas, Jr., of Tucson, Arizona, as a suspected 1,000-kilogram-per-month cocaine dealer. The officers did not attempt to obtain further descriptions of the two suspected dealers. They summoned the handler of the narcotics-detecting dog for the Drug Enforcement Unit, Detective Luedke. When Luedke arrived, Hurrle informed him of the information the officers had obtained, and Pautz left for another assignment. J.A. 10-11, 57-58.

As detectives Hurrle and Luedke observed from their cars in the motel parking lot, two men left the motel and entered the Oldsmobile. Detective Hurrle approached the car, identified himself as a police officer, asked whether he could speak with them, and inquired whether they had any illegal drugs or contraband. Both men denied possessing anything illegal. Hurrle then asked the men for identification. Saul Ornelas, the driver, produced a driver's license in that name. Ismael Ornelas-Ledesma, who was in the front passenger seat, produced a

---

[2] NADDIS is a computerized compilation of DEA's information on known and suspected drug traffickers. J.A. 57.

California driver's license in the name of Ismael Ornelas with a Martinez, California, address. Hurrle asked them if he could search the car, and they consented to the search. J.A. 11-12, 58-59.

Detective Hurrle searched the trunk, and Detective Luedke (without the aid of the drug-sniffing dog) searched the interior of the car. During his inspection, Luedke noticed a loose right rear interior panel on the passenger side of the car. One of the screws used to fasten a vent cover to the panel was, according to Luedke, rusty, and he believed that the rust indicated that the screw had recently been removed.[3] Luedke removed the screw and dismantled the vent area, removed the loose panel, and uncovered a package containing two kilograms of cocaine. The officers arrested petitioners. J.A. 12-13, 59; Tr. 155-159.

2. Petitioners filed pre-trial motions to suppress the cocaine found in the car. The magistrate judge recommended that the motions be denied. J.A. 26. The magistrate judge first determined that the investigatory stop of petitioners was justified by reasonable suspicion that "criminal activity was afoot." J.A. 20. The magistrate judge relied on the officers' experience that cars like the 1981 Oldsmobile are often used for transporting drugs, and their knowledge that petitioners' car was registered in a "source" State for narcotics, that petitioners

---

[3] The court of appeals stated that Luedke did not explain the basis for his inference, but that "maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting." J.A. 59.

had checked into the motel at 4:00 a.m. without reservations, and that the car owner's "name came back on NADDIS as being a drug trafficker, and the name of Ismael Ornelas, Jr. came back on NADDIS as also being a drug trafficker." Ibid.

The magistrate judge next determined that petitioners had validly consented to the search of the car, but that the consent did not extend to the removal of the interior panel. J.A. 21. Because the magistrate judge's own examination of the screw revealed no rust, he did not credit Luedke's testimony that the rusty screw led him to believe that the panel had been removed to store drugs. J.A. 21-22.[4] The magistrate judge thus recommended that the district court hold that the search behind the panel was not supported by the requisite probable cause. J.A. 22. He nonetheless recommended denial of the suppression motions because, under the inevitable discovery exception to the exclusionary rule, the drug-sniffing dog would have detected the drugs. J.A. 22-23.

The district court accepted the magistrate judge's recommendation that the suppression motion be denied, but on a different theory. J.A. 28-35. The court agreed with the magistrate judge that the investigatory stop and consent search were valid, J.A. 28-29, but concluded that it was unnecessary to invoke the inevitable discovery doctrine because, in its view, the search behind the door panel was supported by probable cause,

---

[4] The parties stipulated to the fact that the screw was not rusty. See J.A. 33.

J.A. 30-31. The district court stated that the magistrate judge's probable cause ruling "does not consider the totality of the circumstances leading up to the removal and search of the door panel." J.A. 33. In the district court's view, the model, age, and "source" State of origin of the car, and the fact that two men traveling together checked into the motel at 4:00 a.m. without reservations, formed a "drug courier profile," which, together with the two NADDIS hits and the loose interior car panel, amounted to probable cause to remove the panel and search for drugs. J.A. 33-34.

3. The court of appeals, following its holding in United States v. Spears, 965 F.2d 262 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992), applied a clear-error standard of review to the district court's determinations of reasonable suspicion and probable cause. J.A. 65-66. Spears had noted (965 F.2d at 269) that, in Illinois v. Gates, 462 U.S. 213, 236, 238-239 (1983), this Court stated that courts should not conduct de novo review of the sufficiency of affidavits supporting the issuance of warrants, but instead should review such affidavits to determine only whether the issuing magistrate had a "substantial basis" for finding probable cause. Spears extended that form of deferential review (which it equated to review for clear error) to appellate review of a district court's finding of probable cause in a nonwarrant case. 965 F.2d at 269-270. The court in Spears recognized that probable cause is "a legal conclusion, dependent solely on a factual analysis: the facts are what the police knew

and did; the finding of probable cause is a conclusion that those facts meet the legal criteria for probable cause." Id. at 270. It nonetheless concluded that, "[b]ecause there is little to distinguish a magistrate's probable cause determination in a warrant case and a district judge's probable cause determination in a nonwarrant case, appellate review should be the same for both." Ibid. In either case, "[i]t is the front-line judicial officer * * * who conducts the initial inquiry," and "an appellate panel should not substitute its judgment in either case." Id. at 271.[5]

The court of appeals held that the district court did not err in this case by ruling that the stop was supported by reasonable suspicion, although it regarded the question as "close." J.A. 65.[6] Because the reliability of the information stored in NADDIS had not been established in this case, the court treated a NADDIS hit as no more reliable than a tip from an informant not known to be reliable. Accordingly, the court found the NADDIS hits to be insufficient to support a stop unless corroborated by other facts. J.A. 62. The court concluded, however, that the detectives had sufficient corroboration to

---

[5] The Spears court observed that, "[b]ecause this decision changes the law of this circuit, we have circulated this opinion to all active judges * * *. A majority of the judges has voted not to rehear the case en banc." 965 F.2d at 269 n.2.

[6] Spears addressed only the standard of review of probable-cause determinations, but in this case the court of appeals applied the clear-error standard to the reasonable-suspicion determination as well, observing that "[t]here is no basis for distinguishing in this regard between probable cause and reasonable suspicion. They are adjacent points on a continuum." J.A. 65-66.

establish reasonable suspicion. J.A. 64. The corroborative facts included the make and age of the car, its "source" State origin, the 4:00 a.m. motel check-in without advance reservations, and the fact that the two NADDIS hits, although ultimately proving to have identified individuals other than petitioners, reasonably appeared to the officers at the time to be mutually reinforcing. J.A. 59-60. The court explained that both the names in NADDIS were "very similar" to the names on the motel registry and car registration, and that the ways in which they were not identical were readily explained: "Jr." could have been left off Ismael Ornelas' name in the motel registry, and Miguel Ornelas Ledesma's last names could have been reversed in entering them in the computer. J.A. 63. In the court of appeals' view, "the fact that both the registered owner of the car and the name on the motel registry corresponded more or less to names of suspected drug dealers in the NADDIS database was impressive." Id. at 64.

The court of appeals rejected the district court's probable cause analysis, however, concluding that the denial of the suppression motion could not be upheld "on the basis of the record compiled in the district court." J.A. 66. In the court of appeals' view, the key fact informing the district court's probable cause ruling was Detective Luedke's testimony that the car's right rear interior panel was loose, ibid., but the magistrate judge ruled on alternative grounds "[w]ithout discussing the bearing of Luedke's testimony about the loose

panel on the issue of probable cause," J.A. 67.[7] The court of appeals accordingly vacated the convictions and remanded the case to the district court for a determination of the credibility of Luedke's testimony about the loose panel. If the district court were to credit that testimony, the court of appeals instructed, it must determine whether "the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Detective Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel." J.A. 72-73.

4. On remand, the district court referred the case to the magistrate judge for an initial determination. J.A. 74-75. Before the magistrate judge, the parties stipulated to resolution of the matter on the existing record. J.A. 82. The magistrate judge expressly accepted the credibility of Detective Luedke's testimony that the car's interior panel was loose, but concluded that "the loose panel alone, given the age of the Oldsmobile, is not probative evidence of the fact it necessarily had been recently removed." J.A. 79. The NADDIS hits and other factors alone were not, in the magistrate judge's view, sufficient to establish probable cause to remove the panel. J.A. 79-83. He accordingly recommended that the suppression motion be granted.

---

[7] The court held that the government had waived on appeal the claim, accepted by the magistrate judge, that the presence at the scene of the drug-sniffing dog ensured that the drugs inevitably would have been discovered. J.A. 72. In any event, the court of appeals believed the inevitable-discovery claim could not be supported in the absence of evidence regarding the dog's capabilities and intended use. J.A. 71-72.

J.A. 83, 84.

The district court accepted the finding that Luedke's testimony was credible. J.A. 86. It rejected, however, the magistrate judge's recommended disposition and instead denied the suppression motion. While stating that "the issue is a close one," the district court again reached the conclusion that the facts established probable cause. J.A. 85-90. The court commented that, "[v]iewed individually," the conformity with the drug courier profile, the NADDIS hits, or the loose panel "may be unremarkable," but "[t]hey become more meaningful when, in a specific case, they converge and form around two specific individuals." J.A. 87. The district court viewed the loose panel as "the final fact in a string of unbroken facts which establishes the probable cause equation." J.A. 89.

5. On appeal after remand, the court of appeals upheld under the "clear error" standard the district court's determination that the removal of the door panel was supported by probable cause. J.A. 91-93. The court stated that the district court's opinion "adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search." J.A. 92.

SUMMARY OF ARGUMENT

A court of appeals should apply a de novo standard of review to a trial court's holding of whether the facts known to law enforcement officers add up to the reasonable suspicion or

probable cause required to justify the search or seizure in question.

Probable cause and reasonable suspicion determinations turn on an evaluation of whether the totality of the circumstances give rise to an objectively reasonable basis for conducting a search or seizure. Each inquiry has two components. First, the historical facts known to the officers must be established. Second, once those facts are established, a judgment must be made whether it was objectively reasonable under the known circumstances to draw the conclusion that criminal conduct likely would be brought to light by conducting an investigatory stop or search. The second step in the analysis goes beyond the realm of finding facts, and requires a legal judgment about the constitutionality of the search or seizure.

Under conventional standards for determining the scope of appellate review, the trial court's determination of reasonable suspicion or probable cause to support a warrantless search is subject to de novo review. While factual findings are reviewed only for clear error, courts of appeals customarily conduct plenary review of the governing legal standards. Courts of appeals also conduct plenary review of so-called mixed questions of law and fact when that process is necessary to develop the meaning of a legal standard and to ensure its consistent application. Those considerations strongly support de novo review in the present context. The analysis here parallels that conducted by the Court in Thompson v. Keohane, 116 S. Ct. 457,

465, 467 (1995), in which the Court held that, in federal habeas proceedings, "independent," rather than deferential, review applies to determinations of whether a suspect was in custody for purposes of Miranda warnings. De novo review also accords with this Court's cases, which have in a wide variety of settings subjected probable cause and reasonable suspicion determinations to independent, plenary review.

The advantages that normally justify de novo appellate review are fully applicable here. First, the exposition of the Fourth Amendment standard of reasonableness depends on the process of case-by-case elaboration in the appellate courts. Second, the development of the law at the appellate level gives guidance to law enforcement officers and promotes consistent outcomes in the trial courts. Third, the considerations favoring de novo review have special force where, as here, a constitutional right is concerned.

Nothing in this Court's decisions suggests that deference is owed to a trial judge's finding that a warrantless search was or was not justified by the requisite level of suspicion. In Illinois v. Gates, 462 U.S. 213 (1983), this Court held that after-the-fact review of a neutral magistrate's determination to issue a search warrant should be conducted deferentially, and that the warrant should be upheld "so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." Id. at 236. That conclusion reflected the "preference to be accorded to warrants" under the

Fourth Amendment, id. at 237 n.10; it has no application to appellate review of a district court's determination of the validity of a warrantless search or seizure. Similarly, this Court's decisions approving deferential review of legal issues that involve supervision of litigation, events occurring before the trial court, or mixed questions of fact and law such as negligence that are traditionally administered by juries, are inapplicable to the constitutional conclusion, rendered by the courts, of whether a warrantless search was justified. That conclusion requires a balance of law enforcement needs against privacy interests, and it calls for plenary appellate review.

The court of appeals in this case did not apply a de novo standard, but instead approved the stop and search in question based on deferential, clear-error review of the district court's conclusions. In our view, both the stop and search, if reviewed under a de novo standard, should be upheld as supported by the requisite levels of suspicion. Because the court of appeals has not yet applied the de novo standard to the facts found here, this case should be remanded to that court for application of the proper standard of review.

ARGUMENT

IN REVIEWING A DISTRICT COURT'S DETERMINATION OF WHETHER REASONABLE SUSPICION OR PROBABLE CAUSE EXISTED FOR A WARRANTLESS SEARCH OR SEIZURE, A COURT OF APPEALS SHOULD APPLY A DE NOVO STANDARD

A. Reasonable Suspicion And Probable Cause Are Objective Legal Conclusions Based On The Totality Of The Circumstances

The investigative stop of petitioners was permissible under the Fourth Amendment if supported by reasonable suspicion, Terry v. Ohio, 392 U.S. 1 (1968), and the warrantless search of their car was valid if based on probable cause, California v. Acevedo, 500 U.S. 565, 569-570 (1991); Carroll v. United States, 267 U.S. 132, 158-159 (1925). The standards for both reasonable suspicion and probable cause depend on a determination, given the totality of the circumstances, of whether an objectively reasonable law enforcement officer would have justification for the stop or search at issue. United States v. Cortez, 449 U.S. 411, 418 (1981) (reasonable suspicion); Illinois v. Gates, 462 U.S. 213, 230-231 (1983) (probable cause). Each inquiry requires a two-step analysis: first, an identification of all the pertinent facts known to the law enforcement officers conducting the stop or search, and, second, an evaluation of whether, as a matter of objective reasonableness, that information adds up to reasonable suspicion or probable cause to believe that the stop or search will uncover contraband or evidence of a crime.

It is well established that the second step of determining probable cause requires more than just a factual analysis; it requires, instead, an appraisal of the totality of the

circumstances under an objective, legal standard. Gates, 462 U.S. at 230, 238. Probable cause exists where "the facts and circumstances within [the law enforcement officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" the search will yield evidence of a crime. Carroll, 267 U.S. at 162. The probabilities with which the concept is concerned "are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). The substantive standard reflects an appropriate deference to law enforcement officers: the facts must be evaluated not as an average citizen would understand them, but from the perspective of an officer "versed in the field of law enforcement." Gates, 462 U.S. at 232, quoting Cortez, 449 U.S. at 418.

The reasonable suspicion standard closely parallels the objective framework for analyzing probable cause, but because an investigative stop is less intrusive than a search, the suggestion that crime, contraband, or evidence of crime may be present need not be as strong. United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975); Alabama v. White, 496 U.S. 325, 330 (1990). Reasonable suspicion to stop exists when, based on the totality of the circumstances, "the detaining officers * * * have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Cortez, 449

U.S. at 417-418. Like probable cause, reasonable suspicion is not an historical fact; it is a legal conclusion, measured by an objective constitutional standard. Terry, 392 U.S. at 21-22; Cortez, 449 U.S. at 417-418; Brown v. Texas, 443 U.S. 47, 52 n.2 (1979).

B. The Ultimate Conclusion In Nonwarrant Cases Of Whether Reasonable Suspicion Or Probable Cause Exists Is Subject To De Novo Appellate Review

1. The standards of appellate review generally applicable to questions of fact and questions of law are well established. Appellate courts "accept[] findings of fact that are not 'clearly erroneous' but decid[e] questions of law de novo." First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1926 (1995); see Pierce v. Underwood, 487 U.S. 552, 558 (1988). Appellate deference to a trial court's findings of fact is mandated in the civil context by Federal Rule of Civil Procedure 52(a), which provides that a trial court's findings of fact "shall not be set aside unless clearly erroneous." In the context of federal habeas corpus review of state court judgments, Congress has conferred a presumption of correctness, subject to enumerated exceptions, on state courts' findings of fact. 28 U.S.C. 2254(d). There is no similar express rule governing direct appeals in criminal cases, but this Court applies the clearly erroneous standard to findings of fact in the criminal setting as well. Maine v. Taylor, 477 U.S. 131, 145 (1986); see also Hernandez v. New York, 500 U.S. 352, 365-366 (1991) (plurality opinion). In contrast, appellate courts are generally free to

conduct a de novo review of legal conclusions, and it is their principal function to do so. Salve Regina College v. Russell, 499 U.S. 225, 231-232 (1991). Under a de novo standard, appellate courts must "make an independent determination" of the legal conclusions of the lower courts. United States v. First City National Bank, 386 U.S. 361, 368 (1967); Salve Regina College, 499 U.S. at 231.

The traditional standards of review of fact and law serve systemic goals of "doctrinal coherence and economy of judicial administration." Salve Regina College, 499 U.S. at 231. The application of the clearly erroneous standard to questions of fact recognizes that trial judges are "usually in a superior position to appraise and weigh the evidence." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); see also Thompson v. Keohane, 116 S. Ct. 457, 465 (1995); Miller v. Fenton, 474 U.S. 104, 114 (1985). The district courts have "unchallenged superiority" in factfinding, Salve Regina College, 499 U.S. at 233, because their energy and resources are primarily devoted to the time-consuming tasks associated with hearing evidence and finding facts. They seldom, however, have the opportunity for extensive reflection on legal issues. Courts of appeals, in contrast, are institutionally structured to focus principally on deciding legal issues. They hear arguments but do not face the burdens of taking evidence, and they enjoy the benefits of a "collaborative juridical process that promotes decisional accuracy." Id. at 232. In addition, the coherent

development of a body of law requires appellate courts to establish controlling principles and to demonstrate the meaning of those principles through their consistent application across a range of varying factual contexts. Thompson, 116 S. Ct. at 467.

There is no dispute that the underlying factual circumstances that bear on reasonable suspicion and probable cause determinations are issues of fact, reviewable under the deferential clearly erroneous standard. This Court has defined factual findings as "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators,'" Thompson, 116 S. Ct. at 464, quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963). Findings regarding what information was known to officers conducting a stop or a warrantless search, and when and how they learned it, are factual in that sense, and thus, under the clear-error standard, may not be reversed unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); see also Anderson v. City of Bessemer City, 470 U.S. 564, 573-574 (1985) (discussing when error is "clear" and giving trial court choice between two permissible views of the evidence).

The ultimate determination of probable cause or reasonable suspicion, however, is not a factual matter. Courts must decide as a matter of law whether the facts supply the requisite quantum of suspicion to render a search or seizure "reasonable" under the

Fourth Amendment. Probable cause and reasonable suspicion are judged under an objective standard, measured by what a reasonable person would conclude; those determinations are not controlled by the subjective state of mind of the officers conducting the search. See Terry, 392 U.S. at 21-22; Gates, 462 U.S. at 231; Florida v. Royer, 460 U.S. 491, 507 (1983) (plurality opinion). Here, as elsewhere, the reasonable person is a "legal construct," calling for a judgment that goes far beyond determination of "what happened."[8] In the Fourth Amendment setting, that construct requires a judgment about the degree of information needed to justify the intrusion in question. The courts must give content to the general concepts of reasonable suspicion and probable cause in a manner that "safeguard[s] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while "giv[ing] fair leeway to enforcing the law in the community's protection." Brinegar, 338 U.S. at 176. In addition, the conclusion whether probable cause or reasonable suspicion existed in a particular case not only provides the rule of decision for the case at hand, but also establishes guidance for public officials and courts confronted with similar circumstances in the future.

---

[8] Antilles S.S. Co. v. Members of Am. Hull Ins. Syndicate, 733 F.2d 195, 204 (2d Cir. 1984) (Newman, J., concurring) ("[I]f the law's hypothetical reasonable person were to appear in the courtroom as a deus ex machina and respond to an inquiry as to what he or she thought the terms [of the contract] meant, the answer would be a matter of fact in the traditional sense-- an observable, recordable historical event. But the law's reasonable person has not yet appeared on the witness stand of any courtroom. That person remains a legal construct.").

Probable cause and reasonable suspicion determinations might be characterized as "mixed question[s] of law and fact." Thompson, 116 S. Ct. at 465.[9] As between a legal and a mixed question, however, the precise characterization is not crucial, because mixed questions, too, are typically subject to de novo review. A standard of "independent review" is generally applied to "mixed question[s] of law and fact," so that the appellate courts may elaborate the meaning of precedent and explicate underlying "legal values" through case-by-case review. Id. at 464 n.9, 465, 467; see also Miller, 474 U.S. at 109; Strickland v. Washington, 466 U.S. 668, 698 (1984); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984); Cuyler v. Sullivan, 446 U.S. 335, 342 (1980); Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972).

2. This Court's recent decision in Thompson, involving a mixed question of law and fact closely analogous to the Fourth Amendment issues here, reinforces the conclusion that the reasonable suspicion and probable cause determinations should be reviewed de novo. To determine whether a suspect is "in custody" for Miranda purposes, a court must, applying "the totality of the circumstances," determine "how a reasonable man in the suspect's position would have understood his situation." Berkemer v.

---

[9] A mixed question is one "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

McCarty, 468 U.S. 420, 442 (1984). Citing the applicable "reasonable man" standard, the respondents in Thompson argued that the "in custody" inquiry was factual. The Court rejected that argument, stressing the distinction between the first step, "identification of the 'totality of the circumstances,'" and the second, evaluation of whether those circumstances, "if encountered by a 'reasonable person,' would * * * add up to custody as defined in Miranda." 116 S. Ct. at 466. The Court accordingly concluded that the presumption of correctness that attaches to state court factual determinations under 28 U.S.C. 2254(d) does not apply to Miranda custody determinations. See also Miller, 474 U.S. at 112 ("[T]he ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.").

Reasonable suspicion and probable cause determinations entail the same two-step approach of viewing the "totality of the circumstances" through the eyes of a "reasonable person," and there is no basis for treating the ultimate constitutional question of objective reasonableness differently here from the Court's treatment of the Miranda custody question in Thompson. In sum, whether the second step of the probable cause inquiry is viewed as a legal or a mixed question, it involves a determination, unanswerable by simple recourse to the facts, concerning whether the known information justified a reasonable

conclusion that a search was sufficiently likely to turn up evidence of a crime. As such, it should be reviewed de novo.

3. This Court has expressly indicated that probable cause determinations regarding warrantless searches or arrests are to be accorded independent appellate review. In Ker v. California, 374 U.S. 23 (1963), the petitioners challenged, for lack of probable cause, the legality of a warrantless search made incident to their arrest. Before reviewing the evidence bearing on the existence of probable cause, the Court addressed the question of the applicable standard of review, commenting that, "[w]hile this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected." Id. at 34. Conducting its own de novo review, the Court then proceeded "to examine the entire record including the findings of California's courts to determine whether the evidence seized from petitioners was constitutionally admissible under the circumstances of th[e] case." Ibid.

In another warrantless search case, Beck v. Ohio, 379 U.S. 89 (1964), the Court relied on Ker for the same principle. The Court reiterated that it had a responsibility to make an "independent examination" of the record to resolve the ultimate

question of whether the constitutional standard of probable cause was satisfied. Id. at 92, quoting Ker, 374 U.S. at 34.[10] See also Elkins v. United States, 364 U.S. 206, 223-224 (1960) (in discarding the "silver platter" doctrine that allowed use in federal trials of evidence seized by state agents without probable cause, the Court stated that, "[i]n determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out").

In many cases, the Court has, without expressly articulating the applicable standard of review, conducted a careful, detailed examination of the established facts to determine whether they amounted to reasonable suspicion or probable cause. For example, in Carroll v. United States, 267 U.S. 132 (1925), the Court approached the determination of probable cause as if it were deciding the issue afresh, posing for itself the question "was there probable cause?" and examining the facts in detail, id. at 159-161, rather than simply asking whether the district court's determination was clearly erroneous. Similarly, in Brinegar v. United States, 338 U.S. 160, 165-171 (1949), the Court observed

[10] Both Ker and Beck involved direct review of probable cause rulings made by state courts instead of federal district courts. But the Court's requirement in those cases of independent appellate review is equally applicable to review of federal court determinations. As the Court stated in Bose Corp., 466 U.S. at 499, it would "pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of [the lower] federal courts." See also Hernandez, 500 U.S. at 369 (plurality opinion).

that the facts were "substantially undisputed," id. at 162, and itself addressed "[t]he crucial question * * * whether there was probable cause for Brinegar's arrest," id. at 164. The district court had held that the officers lacked probable cause when they began to chase petitioner's car, and the court of appeals affirmed.[11] This Court, however, made its own detailed analysis of the facts and arrived at the opposite conclusion. The Court viewed the case as "indistinguishable" from Carroll, and held that it "necessarily follows" that the lower court's decision must be reversed if Carroll "is to continue in force." Id. at 171. The Court expressly rejected the practical results that clear-error review would tolerate: "In the absence of any significant difference in the facts, it cannot be said that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Ibid.[12]

Cases involving reasonable suspicion also reflect a long-established mode of review that can only be described as de novo. In Terry v. Ohio, 392 U.S. 1 (1968), this Court itself

[11] The lower courts had, however, rejected the suppression motion on the alternative grounds that petitioner's admission after his car was stopped provided probable cause for the search. 338 U.S. at 163.

[12] Probable cause determinations are also reviewed de novo in civil suits to recover damages for warrantless searches allegedly conducted without probable cause. In determining whether a government official is entitled to qualified immunity, reviewing courts determine as a matter of law whether, given the established facts, a reasonable officer could have believed there was probable cause to search. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

"examine[d] the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable." Id. at 27. In doing so, the Court did not defer to the trial court's determination, see id. at 8, but instead drew its own independent conclusion, stating: "We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." Id. at 28.

Similarly, in United States v. Cortez, 449 U.S. 411, 418-421 (1981), this Court itself reviewed the facts in detail and arrived at an independent conclusion regarding the presence of reasonable suspicion. The Court posed the question as "whether, based upon the whole picture, * * * experienced Border Patrol officers[] could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity," and determined that, "[o]n this record, they could so conclude." Id. at 421-422. In United States v. Sokolow, 490 U.S. 1 (1989), the Court emphasized its own role in reviewing the facts: "In evaluating the validity of a stop such as this, we must consider 'the totality of the circumstances -- the whole picture.'" Id. at 8, quoting Cortez, 449 U.S. at 417 (emphasis added). And in Alabama v. White, 496 U.S. 325 (1990), the Court again arrived at an independent conclusion based on its analysis of the established facts, stating that, "[c]ontrary to the court below, we conclude

that when the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity." Id. at 331-332. Again, the Court made no determination whether the lower court had made any clear errors. In none of these probable cause or reasonable suspicion cases did the Court suggest a need for deference to the district court, or imply that anything other than an independent determination of the ultimate issue was appropriate on appellate review.

C. The Precedential Importance Of Reasonable Suspicion And Probable Cause Conclusions, And The Need For Consistent Standards To Guide Official Conduct, Support A De Novo Standard Of Review

This Court has noted "the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." Miller, 474 U.S. at 113-114, citing Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 237 (1985). The classification of an issue as factual or legal may "turn[] on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." 474 U.S. at 114. See also Thompson, 116 S. Ct. at 465 (referring to "practical considerations that have prompted the Court to type questions * * * as 'factual issue[s]'"); First Options of Chicago, 115 S. Ct. at 1926 (referring to "respective institutional advantages" that affect "the reviewing attitude that a court of appeals takes toward a district court decision");

Pierce, 487 U.S. at 559-560; Bose Corp., 466 U.S. at 501-502 (identifying factors relevant to drawing the distinction between law and fact).

Those institutional considerations favor de novo review here. First, de novo review is appropriate because of the importance of the appellate court's "function as an expositor of law" regarding reasonable suspicion and probable cause. Miller, 474 U.S. at 114. The necessarily general nature of the reasonable suspicion and probable cause standards means that defining what conduct falls within constitutional bounds remains a task to be carried out through individual decisions. The Fourth Amendment reasonableness standards are not "susceptible of Procrustean application." Ker, 374 U.S. at 33. Rather, as the Court stated in Terry, 392 U.S. at 29, the limitations imposed by the Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases."

This Court has recognized that where, as here, "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication," the standard should be treated as one of law subject to de novo appellate review. Bose Corp., 466 U.S. at 502; see Miller, 474 U.S. at 114 (where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its

primary function as an expositor of law"); see also United States v. McConney, 728 F.2d 1195, 1200 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984); Monaghan, supra, 85 Colum. L. Rev. at 229, 273-276. Given a standard of objective reasonableness, the purely legal function of saying "what the law is" can be accomplished only by applying the basic standard to a series of closely related situations and thereby elaborating that standard. The exercise of decisional power in individual cases is, in circumstances such as these, "the process through which the rule itself evolves and its integrity is maintained." Bose Corp., 466 U.S. at 503.

A second, and closely related, functional principle that favors de novo review in this context is the need to give guidance to law enforcement officers to enable them to apply the constitutional standards consistently across the wide range of individual cases. The several decisions of this Court, and the body of case law developed by the federal courts of appeals, are the central means of spelling out the requirements of Fourth Amendment, providing guidance for law enforcement personnel, and reconciling conflicting trial court approaches. "[T]he protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." New York v. Belton, 453 U.S. 454, 458 (1981) (internal quotation marks

omitted). As this Court recently confirmed in Thompson, "the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law," and those effects "serve legitimate law enforcement interests." 116 S. Ct. at 467.

This Court's decisions illustrate how case-by-case review of reasonable suspicion and probable cause determinations refine those standards and give rise to principles of general application to subcategories of Fourth Amendment cases. For example, the Court has offered guidance regarding the permissible weight to give certain recurring types of potentially suspicious activity, such as mere association with a known offender, United States v. Di Re, 332 U.S. 581, 593 (1948), flight upon the approach of police officers, Sibron v. New York, 392 U.S. 40, 66 (1968), and presence in neighborhood known to be frequented by drug users, Brown v. Texas, 443 U.S. 47, 52 (1979); see generally 2 W. LaFave, Search and Seizure § 3.6, at 29-74 (2d ed. 1987). Standards have also emerged regarding the permissible scope of a search of an automobile. See, e.g., California v. Acevedo, 500 U.S. 565 (1991) (probable cause to search a container authorizes search even in the absence of probable cause to search automobile in which container is found); United States v. Ross, 456 U.S. 798 (1982) (probable cause to search a vehicle authorizes search of containers and packages therein); see generally 3 W. LaFave, supra, §§ 7.1-7.5, at 1-145. And courts have dealt with such issues as the relevance of an offender "profile" to the issue of

reasonable suspicion. United States v. Sokolow, 490 U.S. at 10. It is through the development of such subsidiary standards that the general Fourth Amendment reasonableness standards gain specific content, and are subject to consistent administration by lower courts and law enforcement personnel.

Third, the considerations favoring de novo review carry special weight where a constitutional right is concerned. As the Court stated in the First Amendment context in Bose Corp., "the constitutional values protected by the rule make it imperative that judges -- and in some cases judges of this Court -- make sure that it is correctly applied." 466 U.S. at 502. Indeed, the Court has referred to independent review as a "duty of constitutional adjudication." Haynes v. Washington, 373 U.S. 503, 515 (1963). The Constitution has the same meaning in the hands of different law enforcement personnel and different district courts. "[D]eferential appellate review," however, would "invite[] divergent development of * * * law," Salve Regina College, 499 U.S. at 234, and disparate application of constitutional principles.

D. Neither Illinois v. Gates Nor Other Decisions Of This Court Support A Deferential Standard Of Review For District Court Determinations Of The Validity Of Warrantless Searches And Seizures

1. In adopting the clear-error standard of review for district court determinations of whether a warrantless search was supported by probable cause, the Seventh Circuit relied on Illinois v. Gates, supra. United States v. Spears, 965 F.2d 262, 269-272 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992); J.A. 65-

66, 92 (citing Spears). In Gates, the Court reaffirmed the "traditional standard" of deferential review of a magistrate's determination that an affidavit was sufficient to establish probable cause for the issuance of a warrant. 462 U.S. at 236. Gates clarified that under that approach the affidavit is reviewed only to ensure that the magistrate had a "substantial basis" for issuing the warrant. Id. at 238-329. Because the probable cause standard is the same in both warrant and nonwarrant cases, the Seventh Circuit concluded that "[i]t would be anomalous to require a more searching review of a district judge's probable cause determination" in nonwarrant cases than of a magistrate's decision to issue a warrant. Spears, 965 F.2d at 270. The court of appeals thus held that a "clearly erroneous" standard should be applied in both contexts. Ibid.

The Seventh Circuit's reliance on Gates is misplaced. The "substantial basis" test of Gates reflected "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." 462 U.S. at 236. The Court reasoned that, "[i]f the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search." Ibid. The Court added that "the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct." Ibid. For those reasons, the Court indicated

that a reviewing court's duty is "simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." Id. at 238-239.

Gates's description of the "preference" for warrants, and the deferential review of magistrate determinations, is grounded in substantive Fourth Amendment principles long recognized by this Court. See United States v. Ventresca, 380 U.S. 102, 106, 109 (1965) (because "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall," the resolution of such a case "should be largely determined by the preference to be accorded to warrants"); United States v. Watson, 423 U.S. 411, 423 (1976) (law enforcement officers' "judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate"); United States v. Leon, 468 U.S. 897, 914 (1984) ("[W]e have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination."). The reasoning of Gates, however, is not applicable to the allocation of functions between a district court and court of appeals in the review of warrantless searches and seizures. There is no reason grounded in Fourth Amendment doctrine to give leeway on appeal to a district court's after-the-fact conclusion that probable cause existed for a warrantless search, with the resulting potential for restriction of an individual's constitutional rights. Nor is there reason for appellate deference to a trial court's after-the-fact conclusion

that probable cause was lacking, with the resulting potential for injury to law enforcement interests and society's stake in the availability of lawfully obtained evidence in a criminal prosecution.[13] Fourth Amendment policy supports giving appropriate deference to the magistrate's determination to encourage the use of warrants. It does not, however, favor district court determinations over those of appellate courts on the ultimate determination of the constitutionality of a warrantless search or seizure. In sum, while there is a sound doctrinal basis for the standard adopted in Gates, no corresponding principle supports appellate deference to a trial court's decision upholding or invalidating a warrantless search or seizure.[14]

---

[13] Under 18 U.S.C. 3731, the government may appeal "from a decision or an order of a district court[] suppressing or excluding evidence * * *." See United States v. Ceccolini, 435 U.S. 268, 271 n.1 (1978); 4 W. LaFave, supra, § 11.7(b), at 509-512.

[14] The Court in Gates did state, in passing, that "[t]here are so many variables in the probable-cause equation that one determination will seldom be a useful 'precedent' for another." 462 U.S. at 238 n.11. That statement was not a holding of Gates, nor was it addressed to what standard of review appellate courts should apply to district court determinations of probable cause in nonwarrant cases (an issue that was not presented in Gates). Rather, it was made in the context of explaining the Court's disinclination to conduct a retrospective evaluation of the sufficiency of the affidavit presented to the magistrate in Spinelli v. United States, 393 U.S. 410 (1969), a case that Gates overruled. See 462 U.S. at 238 (overruling "'two-pronged test' established by our decisions in Aguilar [v. Texas, 378 U.S. 108 (1964)] and Spinelli"). As discussed above, the Court's determinations of probable cause and reasonable suspicion issues have provided guidance to lower courts and law enforcement officers, and have harmonized results reached in different cases on similar facts. Gates cast no doubt on the line of cases in this Court (see pages 22-27, supra) that had applied independent, rather than deferential, review to lower court determinations of the

2. Other cases in which this Court has accorded deferential, clear-error review to questions extending beyond the historical facts are also inapplicable in this setting. Those cases fall into three main categories: those dealing with supervision of litigation on factbound issues, those that are heavily dependent on credibility determinations relating to an individual's subjective state of mind, and those involving mixed questions of law and fact that are traditionally decided by juries. None of those circumstances is present here.

In Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 399 (1990), the Court acknowledged that, in reviewing a district court's decision imposing sanctions under Federal Rule of Civil Procedure 11, "[l]egal issues are raised in considering whether a pleading is 'warranted by existing law or a good faith argument' for changing the law and whether the attorney's conduct violated Rule 11." The Court nonetheless concluded that deferential review of Rule 11 decisions is appropriate. Similarly, in Pierce v. Underwood, 487 U.S. 552, 557-563 (1988), the Court held that an abuse-of-discretion standard applies to all aspects of review of district courts' attorneys' fees determinations under the Equal Access to Justice Act, even though the question whether the government's litigating position was "substantially justified" has legal elements. Id. at 560.

The Court in both cases held that those fact-bound issues involving the supervision of litigation before the district

---

validity of warrantless searches and seizures.

courts were ill-suited to de novo appellate review. As the Pierce Court explained, "[b]y reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government." 487 U.S. at 560; see Cooter & Gell, 496 U.S. at 403-404. An appellate court could not easily familiarize itself with litigation events not appearing in the record, nor would the effort be justified in view of the limited precedential value of the result: the questions in these cases are "multifarious and novel," and "little susceptible, for the time being at least, of useful generalization." Pierce, 487 U.S. at 562; Cooter & Gell, 496 U.S. at 404.

The litigation-supervision rationale is inapplicable here. Probable cause and reasonable suspicion are not matters relating to the proper conduct of litigation before the district courts, but are matters of constitutional privacy rights and effective law enforcement; as discussed above, the utility of the development of constitutional precedent in this area is substantial.

The second line of cases in which this Court has applied a deferential standard of review to nominally legal questions "extending beyond the determination of 'what happened'" includes such issues as "competency to stand trial (e.g., Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam)); and juror

impartiality (e.g., [Wainwright v.] Witt, 469 U.S. [412,] 429 [(1985)]; Patton v. Yount, 467 U.S. 1025, 1036 (1984); Rushen v. Spain, 464 U.S. 114, 120 (1983))." Thompson, 116 S. Ct. at 464 (parallel citations omitted). The Court in Thompson described those determinations as essentially factual, and thus entitled to a presumption of correctness for purposes of Section 2254(d), because they deal with largely subjective standards, whose proper resolution "depends heavily" on "credibility findings whose basis cannot be easily discerned from an appellate record." 116 S. Ct. at 465. Because "the critical events," Miller, 474 U.S. at 117, surrounding the determination of juror impartiality and defendant competency -- e.g., juror voir dire and the court's first-hand observation of the defendant in a competency proceeding -- take place "in open court," Thompson, 116 S. Ct. at 466, quoting Miller, 474 U.S. at 117, it is appropriate to accord the judgment of the trial court, as "jurist-observer," presumptive weight, Thompson, 116 S. Ct. at 465.

Probable cause and reasonable suspicion determinations, in contrast to competency and juror bias, involve application of an objective standard to out-of-court events and information known to officers at an earlier time. A trial court has no "first-person vantage" on those events, Thompson, 116 S. Ct. at 466, and its "superior capacity to resolve credibility issues is not dispositive," id. at 465. Like the Miranda custody decision in Thompson, the Fourth Amendment reasonableness standards are objective, and thus different in character from determinations of

juror bias or competency to stand trial, which depend heavily on assessing the subjective state of mind of the juror or the defendant.[15]

Finally, it is traditional in our legal system to entrust "reasonable person" determinations in negligence cases to the trier of fact, subject only to deferential review. See Cooter & Gell, 496 U.S. at 402. As this Court explained in Thompson, however, the basis for that tradition lies in the entrustment of most negligence issues to juries, which are invited "to apply community standards" and whose decisions "cannot be reduced to anything approaching a definite rule." 116 S. Ct. at 466 n.13. Probable cause and reasonable suspicion determinations, however, are made by "[j]udges alone," and "they do so with a view to identifying recurrent patterns, and advancing uniform outcomes." Ibid. Moreover, the reasonableness of a search or seizure is not solely a function of community standards, but turns on a "balancing of competing interests" embodied in the Fourth Amendment. See Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981). The task of "hold[ing] the balance true" is for the courts. Gates, 462 U.S. at 241.

---

[15] The Thompson Court also observed that, "in fathoming the state of mind of a potential juror or a defendant in order to answer the questions, 'Is she free of bias?,' 'Is he competent to stand trial?,' the trial court makes an individual-specific decision, one unlikely to have precedential value." 116 S. Ct. at 466. Reasonable-suspicion and probable cause determinations, however, like the determination of custodial status at issue in Thompson, do have "law-clarifying benefits," and carry precedential weight. Id. at 466 n.14.

* * *

Applying a de novo standard to the ultimate legal questions whether reasonable suspicion and probable cause were present on the established facts of this case, we believe that both the stop and search were constitutionally valid and should be upheld. The court of appeals, however, stated that it reviewed the reasonable suspicion and probable cause determinations only for clear error. J.A. 65-66, 92. Because the questions whether, under a de novo standard, the officers' reasonable suspicion and probable cause determinations should be sustained were not presented in the petition for certiorari (nor do petitioners discuss or request that this Court decide those issues, see Br. 42), this Court should vacate the judgment below and remand the case to the court of appeals for application of the correct standard. Sup. Ct. Rule 24.1(a); see, e.g., Thompson, 116 S. Ct. at 467; Miller, 474 U.S. at 118.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

JANUARY 1996

Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. 95-5257

In The

Supreme Court of the United States

October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

ROBERT G. LEBELL*
STYLER, KOSTICH, LEBELL,
DOBROSKI & MCGUIRE
100 East Wisconsin
Suite 1700
Milwaukee, WI 53202-4114
(414) 276-1233
Counsel for Petitioner
Saul Ornelas

BRIAN W. GLEASON
230 W. Wells Street
Suite 702
Milwaukee, WI 53203
(414) 277-5076
Counsel for Petitioner
Ismael Ornelas-Ledesma

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

THE COURT OF APPEALS WAS INCORRECT IN APPLYING THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO THE DISTRICT COURT'S RULING REGARDING REASONABLE SUSPICION AND PROBABLE CAUSE 1

A. No matter how fact-intensive, all warrantless Fourth Amendment cases should be reviewed *de novo* 1

B. All Fourth Amendment cases have precedential value 7

C. *De novo* review furthers the appellate objective of error correcting 12

D. *De novo* review of warrantless Fourth Amendment cases is required to avoid inconsistent results on appeal 13

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Bessemer City, 470 U.S. 564 (1985) 5, 12

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 13

Brewer v. Williams, 430 U.S. 387 (1977) 4

Commissioner v. Duberstein, 363 U.S. 278 (1960) 4, 5

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 8

Davis v. North Carolina, 384 U.S. 737 (1966).....4, 13

Dow Chemical Corporation v. United States, 476 U.S. 227 (1986) 6

Florida v. Riley, 488 U.S. 445 (1989)..... 6

Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989) 2, 13

Illinois v. Gates, 462 U.S. 213 (1983) 9, 10, 14, 15

Jackson v. Virginia, 443 U.S. 307 (1979).....14, 15

Maryland v. Garrison, 480 U.S. 79 (1987) 14

Miller v. Fenton, 474 U.S. 104 (1985)..... 1

Pierce v. Underwood, 487 U.S. 552 (1988) 10

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 2

Salve Regina College v. Russell, 499 U.S. 225 (1991) 2

Silberman v. United States, 365 U.S. 505 (1961) 6

Spinelli v. United States, 393 U.S. 410 (1969) 10

Stone v. Powell, 428 U.S. 465 (1976).....16, 17

TABLE OF AUTHORITIES – Continued

Page

Sumner v. Mata, 455 U.S. 591 (1982)..... 4

Thompson v. Keohane, 116 S.Ct. 457 (1995)....7, 8, 9, 10, 13

United States v. Gypsum Company, 333 U.S. 364 (1948)..... 12

United States v. Leon, 468 U. S. 897 (1984)..... 14

CONSTITUTION, STATUTES AND RULES

U.S. Const.:

First Amendment..... 13

Fourth Amendment..... *passim*

Fifth Amendment..... 13

Sixth Amendment 13

28 U.S.C. § 2254(d)..... 7

Equal Access to Justice Act, 28 U.S.C. § 2412(d)..... 10

MISCELLANEOUS

Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment, Third Ed.*, (1966) 11

ARGUMENT

THE COURT OF APPEALS WAS INCORRECT IN APPLYING THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO THE DISTRICT COURT'S RULING REGARDING REASONABLE SUSPICION AND PROBABLE CAUSE.

A. No matter how fact-intensive, all warrantless Fourth Amendment cases should be reviewed *de novo*.

Amicus counsel[1] correctly notes that under either standard, the expenditure of effort by the reviewing tribunal, in considering warrantless Fourth Amendment claims, will remain essentially the same. Amicus brief, at 11. The sole difference resulting from a *de novo* review, as opposed to one conducted under the clearly erroneous standard, is the degree of deference which is accorded the lower court. Accordingly, the conservation of judicial resources cannot be deemed an adequate justification for requiring one standard, over and above the other.

Amicus argues that because historical facts and questions of law are somewhat difficult to clearly distinguish, they should be reviewed with deference to the judicial officer who is " . . . better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104 at 114 (1985). Since the trial court is, according to the claim of amicus counsel, closest to the facts themselves, the reviewing court should defer to the judgment below.

---

[1] All references to "amicus" refer to the independent amicus, Peter D. Isakoff.

The fundamental error in counsel's argument is the premise that the trial court is somehow better positioned to apply the law to the facts.

Petitioners maintain that reviewing tribunals have two main objectives in performing their duties; to correct errors and to develop the law. It is well recognized that federal appeals courts are, by their very nature, better positioned to consider, analyze, and apply developing legal principles. Trial courts are hampered with their crowded calendars which often preclude protracted and exhaustive research of legal issues. Such courts are not permitted, by virtue of the practical limitations of their ever increasing caseloads, to explore at length the complexities presented in Fourth Amendment issues. Courts of appeal routinely engage in a more protracted and reflective analysis of the legal underpinnings of Fourth Amendment issues. Additionally, as was stated earlier, an appellate tribunal is ever mindful of its obligation to develop the law. It is the trial court's responsibility to conduct a fair airing of the facts in order that it may determine whether an established right has been abrogated. It cannot therefor be said that a trial court is better positioned to decide mixed questions of fact and law.

Amicus, at 14, cites this Court's decisions as foundation for the proposition that, "Where no statute or rule expressly governs the matter," the determining factor should be to examine the characteristics of the question under review and the institutional advantage of a federal trial and appellate court in deciding it. *Salve Regina College v. Russell*, 499 U.S. 225, at 231-239 (1991); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 686-87 (1989); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-288

(1982). In short, it is premised that where the issue is fact dependent or fact laden, the mixed question of fact and law which results should be reviewed with the deference permitted under the clearly erroneous standard.

The petitioners maintain that mixed questions of fact and law have three component parts; historical findings of fact, the principle of law to be applied to the factual underpinnings, and the placement or structuring of the facts within the legal framework. Unquestionably, findings of historical facts are reviewed under the clearly erroneous standard.[2] Whether the correct legal principle was utilized is reviewed *de novo*. Petitioners argue that with regard to issues concerning reasonable suspicion to stop and probable cause to search, the actual utilization of the legal principle within the context of the historical facts must be reviewed *de novo*.

By their very nature, in every suppression issue, whether a challenge to the admissibility of a statement, to physical evidence, or to an identification, the circumstances giving rise to the challenged evidence are of crucial import. Each of the suppression issues described herein are fact intensive because they arise from circumstances in which a citizen has been searched, has been interrogated, has been placed in custody, or has been identified as the perpetrator of a criminal offense. It cannot be said therefore, that the application of the

---

[2] Petitioners have always conceded that the judicial officer below is in a better position to decide historical facts. As such, findings of fact and only findings of fact should be reviewed through utilization of the clearly erroneous standard.

appropriate reviewing standard turns on the quantum or intensity of historical facts.

This Court has continuously reviewed *de novo* suppression issues based in different constitutional contexts other than that at bar. *Davis v. North Carolina*, 384 U.S. 737 (1966) (voluntariness of confession); *Sumner v. Mata*, 455 U.S. 591 (1982) (pretrial identification); *Brewer v. Williams*, 430 U.S. 387 (1977) (waiver of Sixth Amendment right to counsel). This Court has never opined that the application of the *de novo* standard is determined by the quantum of facts at issue. Accordingly, there can be no justification for this Court to deviate in warrantless Fourth Amendment cases from the recognized *de novo* review standard which has been heretofore applied to non-Fourth Amendment suppression issues.

Amicus counsel posits that a warrantless Fourth Amendment determination is non-technical and therefore better suited to an "application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case," citing *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960). Amicus Brief at 15. In *Duberstein*, a civil and non-constitutional framed action, the Court determined that because the statutory standard which is to be applied to the factual scenario was "non-technical in nature", the results are reviewed under the clearly erroneous standard. The Fourth Amendment enshrines a multitude of principles which are subject to constant metamorphosis and analysis of competing values and policies. The application of these sophisticated developing principles to a given fact situation is not the simple task described in

Duberstein. Similarly, this process requires a careful and in-depth examination of the fundamental concepts, together with the subtle nuances which have been created by the precedents announced in this Court. A trial court does not engage in an exercise which results in the application of an unerringly static principle to case specific facts. Rather, the application of Fourth Amendment law to a fact situation requires consideration of how the principle developed, in what direction the principle is heading, and by what means it is likely to evolve. The trial court does not merely slap a legal label on the factual model.

It is premised by opposition counsel that *de novo* review should be employed for those questions which will "produce a decision of precedential significance." Amicus brief at 16. Warrantless Fourth Amendment cases, it is urged, are focused on the specific facts and circumstances which surround the search and seizure. Those issues, amicus suggests at 16, "utterly resist generalization." Therefore, it is argued, that questions arising from such case specific facts should be left to the determination of the district court with deferential review on appeal. Warrantless Fourth Amendment cases, according to amicus counsel, will not serve to establish clear guidelines for lower courts, nor will they clarify underlying principles of law. Such determinations, "would very likely contribute only negligibly to the accuracy . . . at a huge cost in diversion of judicial resources". Amicus brief at 17, citing *Anderson v. Bessemer City*, 470 U.S. 564 at 575 (1985). Amicus counsel suggests that "*de novo* review by the Court of Appeals in this case could produce little of real precedential value, at least now that decades of

intense Fourth Amendment litigation have settled the basic principles of probable cause determination." Amicus brief at 22. It is with these propositions that petitioners wholly disagree.

Fourth Amendment law has, to the contrary, been evolving through the decisions announced in this Court, the rulings of lower appellate tribunals, and through the analysis of recognized legal scholars. The Fourth Amendment provides only the framework within which many principles of application have developed. Some of the concepts which have emanated from the Fourth Amendment have gradually eroded with the passage of time. Some have slowly evolved and some wax and wane as societal interests and values change.

The evolution of Fourth Amendment jurisprudence is often in response to technological changes in law enforcement. Thirty five years ago the Court considered whether Fourth Amendment rights were violated when evidence was obtained through sophisticated electronic eavesdropping. *Silberman v. United States*, 365 U.S. 505 (1961). Ten years ago this Court addressed whether the EPA could use aerial photography to enforce environmental laws. *Dow Chemical Corporation v. United States*, 476 U.S. 227 (1986). More recently, this Court faced the issue whether a helicopter hovering 400 feet over a residence in an attempt to spot marijuana growing in the greenhouse was a search within the meaning of the Fourth Amendment. *Florida v. Riley*, 488 U.S. 445 (1989). It should be assumed that appellate courts will soon be asked to consider Fourth Amendment claims arising in the context of the Internet, DNA and gene harvesting seizures. While one specific Fourth Amendment case is clearly of most import

to the individual litigants, the evolution of Fourth Amendment law takes place incrementally with varying facts in common situations which present on a daily basis.

The Fourth Amendment must remain flexible. So too, must appellate courts have the independence to exercise *de novo* review concerning decisions of lower courts which arise within the context of technological changes.

B. All Fourth Amendment cases have precedential value.

The amicus suggests that because Fourth Amendment principles derive from fact dependent determinations, precedential significance is diminished and appellate courts should not devote their resources which *de novo* review would require. Amicus brief at 17-21. A similar argument was recently rejected in *Thompson v. Keohane*, 116 S.Ct. 457 (1995) in the Fifth Amendment context. There, this Court recently rejected the argument that the "in-custody" determination should be accorded a presumption of correctness under 28 U.S.C. § 2254(d). In so doing, the majority could not agree with the dissent's argument that the trial court was in a better position to "decide the relatively straightforward and fact-laden question of *Miranda* custody." Justice Thomas and Chief Justice Rehnquist dissent at 468. The dissent argued that such custody inquiries often require the trial court to make any number of "fact-intensive, close calls" which often involve assessments of credibility and demeanor. Further, the trial court "must consider a complex of diverse and case-specific factors" to understand the position

of the defendant at the time of interrogation. Dissent at 468.

The *Keohane* court stated that there were two lines of cases. In the first line it agreed that there are instances where the trial court is called upon to make determinations concerning primary or historic facts which "depends heavily on the trial court's appraisal of witness credibility and demeanor." *Keohane*, at 465. The majority reasoned that even in those instances where an objective legal standard was employed, as in determining juror bias, the "predominate function . . . involves credibility findings whose basis cannot be easily discerned from an appellate record." In such cases the trial court is better positioned to make the legal conclusion, and the judgment of the "jurist-observer" is accorded presumptive weight. *Id.* at 465. The resolution of the issue in the first line of cases often has little precedential value. Whether a particular juror is biased, or a particular defendant is competent does not easily lend itself to general rule making.

The second line of cases, as typified in *Keohane*, involves often fact-intensive scenarios, which may or may not involve credibility issues. The trial court, however, is not called upon to make credibility determinations concerning events which occurred in the courtroom, nor is the trial court in a uniquely superior position concerning knowledge of local practices, as in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

In this second line of cases the trial court makes the determinations of historical fact, resolves credibility issues if they arise, and then applies an objective test to

resolve the ultimate inquiry. "This ultimate determination, we hold, presents a mixed question of law and fact qualifying for independent review." *Keohane*, at 465. In resolution of the issue in *Keohane*, the court noted "[j]udges alone make the 'in custody' assessments for *Miranda* purposes, and they do so with a view to identifying recurrent patterns, and advancing uniform outcomes. If they cannot supply a definite rule, they nonetheless can reduce the area of uncertainty." *Keohane*, n. 13.

In this second line of cases the resolution of the issue has precedential value. The resolution of fact-intensive issues concerning reasonable suspicion to stop and probable cause to search, just as the "in custody" issue in *Keohane*, are not dependent upon a jurist-observer's superior position to make credibility determinations concerning events which occur in the courtroom. The events of the stop and search, like the retelling of the events of the custodial interrogation, often occurred weeks or months prior to the evidentiary hearing. Although there may be credibility questions to resolve, once the trial court makes those determinations, it applies an objective legal standard, considering the totality of the circumstances, and arrives at a "uniquely legal" determination. *Keohane* at 465.

As will be discussed below, the development of Fourth Amendment jurisprudence arises from the application of varying fact situations to an objective legal test and to precedentially developed principles.

Amicus counsel suggests that *Illinois v. Gates*, 462 U.S. 213 (1983) represents a withdrawal from concrete

and specific guidelines in favor of a "totality of the circumstances" approach. Such standard, it is maintained, is consistent with the more deferential clearly erroneous test. Brief at 20-21. But, as this Court noted in *Thompson v. Keohane*, n. 11, the "totality of the circumstances cast of the 'in custody' determination, contrary to respondent's suggestions, does not mean deferential review is in order."

Amicus counsel at 20, notes dicta from *Gates* at n. 11 that there are "so many variables in the probable cause equation that one determination will seldom be useful 'precedent' for another". The context of this dicta was whether or not the allegations submitted to the Magistrate in *Spinelli v. United States*, 393 U.S. 410 (1969), under the totality of the circumstances test, would support a present finding of probable cause. The court declined to speculate, deeming the result to be of little precedential value.

The amicus brief, at 20-21, states that "most probable cause and reasonable suspicion decisions involve 'multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce v. Underwood*, 487 U.S. 552 at 562 (1988). *Pierce* was not a Fourth Amendment case but was concerned with whether the Secretary was substantially justified within the meaning of the Equal Access to Justice Act, 28 U.S.C. § 2412 (d).

The *Pierce* Court stated that where the question of the appropriate standard of appellate review is not answered by statutory command, "the answer is provided by a long history of appellate practice." As petitioners have noted above, the long history of appellate practice mandates

continued use of the *de novo* standard in warrantless Fourth Amendment issues.

Contrary to the argument of amicus counsel, trial courts do indeed preside over warrantless Fourth Amendment suppression matters which contribute to the development of the law. These decisions result in a compendium of fact situations which, over the passage of time, will reflect changes, evolution and retrenchment from previous applications. Deference to the trial court, as a legal construct, would inhibit both the development of the law and the error correcting function of the intermediary appellate courts.

Amicus argues that because the factual variables are infinite, "Attempts to draw bright lines would be futile." Brief at 22. If this were true, various Attorneys General and local District Attorneys would not write detailed newsletters to law enforcement agencies involving Fourth Amendment issues. If search and seizure law was without precedential value, Wayne LaFave and others would not write volumes on this aspect of Fourth Amendment jurisprudence. Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment, Third Ed.*, (1966). Further, this Court and lower courts would not have published thousands of decisions concerning search and seizure issues. As this Court recognizes, the brighter the line, the easier it will be for law enforcement agencies to anticipate Fourth Amendment problems and respond appropriately. It is the development of this body of Fourth Amendment law which prevents arbitrary and ad hoc enforcement.

C. *De novo* review furthers the appellate objective of error correcting.

The clearly erroneous/*de novo* review dichotomy, in its practical application, creates an anomaly which is in conflict with the overall appellate objective of correcting errors. If an appellate court were to conduct a review and disagree with the conclusions of law of the trial court, it would be free to reverse under the *de novo* standard. If the same appellate tribunal were to review the same conclusions, by the clearly erroneous standard, it would affirm unless the decision was "clearly erroneous". "When the clearly erroneous standard applies, the reviewing court may not reverse the trial court 'simply because it is convinced that it would have decided the case differently.' " *United States v. Gypsum Company*, 333 U.S. 364 (1948). Thus, a reviewing court which disagrees with the trial court's legal conclusion will find its hands tied and will be required to affirm the finding below. Very little guidance has been given by this Court, other than in *Anderson v. Bessemer City*, in defining what errors are clear enough to justify reversal.[3] *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

It is certainly reasonable to anticipate that appellate courts will differ in their assessment of when the clearly erroneous standard has been satisfied. Two appellate courts, in construing similar fact-law determinations could come to diametrically opposed results; one requiring reversal and the

---

[3] " 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

other supporting affirmance. Clearly such inconsistency can hardly be said to further the policy of advancing uniform outcomes and promoting the error correcting function of a reviewing court. Additionally, such an anomaly is an impediment to the second overall objective of appellate tribunals; to develop the law. Courts of appeal must maintain autonomy in application of their legal principles in order to further these objectives.

Amicus counsel, in urging this Court to adopt a clearly erroneous standard for review of warrantless Fourth Amendment issues, inferentially suggests that the Fourth Amendment should not be accorded the same status as other constitutionally enshrouded issues. In First Amendment cases the Court has historically conducted fully independent review, *Harte-Hanks* and *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). Except in cases involving issues of limited precedential value, such as individual juror bias, the Court has consistently accorded *de novo* review to issues which arise as a result of either Fifth or Sixth Amendment challenges. See, *Thompson v. Keohane*, *Davis v. North Carolina*, 384 U.S. 737 (1966). Amicus counsel states no recognized proposition for differentiating Fourth Amendment based issues from those whose origins are founded in other constitutional rights.

D. *De novo* review of warrantless Fourth Amendment cases is required to avoid inconsistent results on appeal.

Amicus counsel's insistence that the clearly erroneous standard for appellate review of probable cause decisions would not denigrate the warrant requirement is

insupportable. Petitioners maintain that the clearly erroneous standard ignores the fundamental precept of *Gates*, to encourage reliance by police officers on use of a warrant. The Court announced in *Gates* that its new substantial basis test, to be utilized in assessing the magistrate's determination of probable cause, was premised upon a practical objective. The Court anticipated that if deference was accorded the magistrate's probable cause finding, police officers would thereby rely upon the implicit security from such deference, and obtain warrants. To accord similar appellate deference in warrantless reviews would announce to law enforcement officials that there is no added benefit in obtaining a warrant. They can, therefore, pursue warrantless searches with the same level of comfort as for those seizures conducted with a warrant.

It is interesting to note that while the *Gates* Court announced the substantial basis standard of review, for the issuance of a warrant, other sub-issues which emanate from the warrant's execution have been reviewed *de novo*; i.e. whether exclusion is mandated where an officer exercises good faith in reliance upon the warrant, *United States v. Leon*, 468 U. S. 897 (1984); and whether the police exercised good faith in their investigation concerning the warrant application, their duty to fully disclose to the magistrate what information they possessed, and the reasonableness of the manner of its execution, *Maryland v. Garrison*, 480 U.S. 79 (1987).

It is argued that to require *de novo* review for probable cause and reasonable suspicion determinations would create incongruous results. Counsel claims that *Jackson v.*

Virginia, 443 U.S. 307 (1979) is supportive of the proposition that appellate review of the sufficiency of the evidence for criminal convictions is clearly erroneous. Amicus brief, at 32. Therefore, to require the stricter *de novo* standard for Fourth Amendment issues is illogical. Counsel's analysis of *Jackson* is incorrect. Reviews of sufficiency of the evidence require a consideration of the facts below and whether any rational trier of fact could find guilt beyond a reasonable doubt. Such a review does not address or take into account pretrial determinations of admissibility of evidence for which there has been a claimed constitutional violation. Once a criminal action has been submitted to the trier of fact, pretrial determinations have been made outside of the presence of the jury.

Of further import to petitioners' challenge to counsel's analysis of *Jackson*, is the fact that the standard of review for a judgement of conviction is wholly different and completely distinguishable from the clearly erroneous standard. The *Jackson* court announced that the appropriate standard for sufficiency of evidence is whether upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The clearly erroneous standard is not whether there is no trier of fact who could have made the same legal conclusion as the tribunal below. A comparison of the standard for appellate review of federal criminal convictions to the clearly erroneous standard is simply mixing apples and oranges.

Amicus counsel further argues that an inconsistency results from the juxtaposition of the *Gates* substantial basis test for warrant reviews and the *de novo* standard for warrantless issues. In theory, the review of a warrant

probable cause determination made by a magistrate, without a full adversary hearing, would require more deference than that accorded legal conclusions drawn by the trier of fact after a full-blown testimonial hearing. Counsel correctly surmises that such variance, while seemingly incongruous, is in fact, "an unavoidable by product of a desire to encourage warrants." Amicus brief, at 31.

The last claimed inconsistency which would emanate from application of *de novo* review to warrantless Fourth Amendment issues arises from consideration of *Stone v. Powell*, 428 U.S. 465 (1976). The *Powell* court determined that in those matters where there has been a full and fair opportunity to litigate suppression issues in the state court, the remedy of federal habeas would be foreclosed. The habeas limitation announced in *Stone v. Powell* was founded exclusively in a policy decision emanating from a consideration of the exclusionary rule. The *Powell* decision holds only that the limited contribution to the exclusionary rule permitting collateral review of Fourth Amendment claims is outweighed by the substantial societal costs. *Powell*, at 494-495.

Counsel suggests that this Court should not distinguish between habeas review of state suppression issues and those considered through direct federal appeal. The proscription announced in *Stone v. Powell* is conditioned upon a full and fair consideration of a defendant's Fourth Amendment claims at the state level. Petitioners maintain that such full and fair litigation includes complete appellate review. This Court agreed with such proposition in its decision in *Powell*; "the force of this justification [preserving the integrity of the judicial process] becomes

minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review." *Stone v. Powell*, at 486.

A federal litigant, in order to be accorded full and fair litigation must, similarly, be permitted access to meaningful, fair and complete appellate review. Opposing counsel erroneously equates the *Powell* Fourth Amendment habeas prohibition with the deference required by the clearly erroneous standard. If this Court is to be consistent in its application of appellate and Fourth Amendment rights, and mindful of the policy limitations which it has carved out to the exclusionary rule, federal appeal litigants must have their Fourth Amendment claims reviewed *de novo*.

CONCLUSION

Petitioners maintain that *de novo* review should be granted in all warrantless Fourth Amendment cases. To do so will maintain continuity in the development of the law, will further the appellate objective of error correcting, and will prevent inconsistent results on appeal. The judgment of conviction should be reversed and the matter remanded.

Respectfully submitted,

ROBERT G. LEBELL*
STYLER, KOSTICH, LEBELL,
DOBROSKI & MCGUIRE
100 East Wisconsin
Suite 1700
Milwaukee, WI 53202-4114
(414) 276-1233

Counsel for Petitioner
Saul Ornelas

BRIAN W. GLEASON
230 W. Wells Street
Suite 702
Milwaukee, WI 53203
(414) 277-5076

Counsel for Petitioner
Ismael Ornelas-Ledesma

*Counsel of Record

March 19, 1996

No. 95-5257

Supreme Court, U.S.
FILED
DEC 20 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SAUL ORNELAS, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF WISCONSIN, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONERS

Tracey Maclin
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Of Counsel:

Barbara E. Bergman
University of New Mexico
School of Law
1117 Stanford N.E.
Albuquerque, New Mexico 87131
(505) 277-3304

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. PROBABLE CAUSE IS A LEGAL JUDGMENT, NOT AN HISTORICAL FACT 6

II. PRIOR RULINGS INDICATE THAT THIS COURT APPLIES A *DE NOVO* STANDARD WHEN REVIEWING THE PROBABLE CAUSE AND REASONABLE SUSPICION CONCLUSIONS OF LOWER COURTS 8

A. This Court Has Consistently Exercised *De Novo* Review Of Probable Cause Determinations By Lower Courts When Considering The Validity Of Warrantless Searches 9

B. This Court Applies A *De Novo* Test When Analyzing The Constitutionality Of Less Intrusive Detentions And Searches 12

Page

III. *ILLINOIS v. GATES* DID NOT ALTER THE TRADITIONAL METHOD FOR REVIEWING PROBABLE CAUSE AND REASONABLE SUSPICION DETERMINATIONS INVOLVING WARRANTLESS INTRUSIONS 17

A. Using A Totality Of The Circumstances Test To Evaluate Probable Cause And Reasonable Suspicion Determinations Does Not Conflict With The Requirement Of *De Novo* Review . . . 17

B. Seventh Circuit Rulings Ignore This Court's Longstanding Preference For A Magistrate's Approval Before An Intrusion Instead Of The Warrantless Decision To Search And Seize 20

IV. THE CLEAR ERROR TEST USED TO REVIEW QUESTIONS OF CONSENT UNDER THE FOURTH AMENDMENT IS NOT RELEVANT TO THIS CASE 22

A. The Issue Of Consent Concerns A Suspect's Mental State 22

B. When The Overall Reasonableness Of Police Behavior Is At Issue, The Rationale Of *Bustamonte* Has Been Confined To Purely Factual Questions . . . 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Aguilar v. Texas,
378 U.S. 108 (1964) 18

Alabama v. White,
496 U.S. 325 (1990) 16, 18

Beck v. Ohio,
379 U.S. 89 (1964) 6, 11, 12, 19, 21, 23

Brinegar v. United States,
338 U.S. 160 (1949) 4, 10, 11, 18

Carroll v. United States,
267 U.S. 132 (1925) 9, 10

Elkins v. United States,
364 U.S. 206 (1960) 11

Florida v. Jimeno,
500 U.S. 248 (1991) 25

Florida v. Rodriguez,
469 U.S. 1 (1984) 15

Henry v. United States,
361 U.S. 98 (1959) 4, 7

Illinois v. Gates,
462 U.S. 213 (1983) 5, 15, 17, 18, 19, 20

Illinois v. Rodriguez,
497 U.S. 177 (1990) 18, 24, 25

Johnson v. United States,
333 U.S. 10 (1948) 19

Ker v. California,
374 U.S. 23 (1963) 6, 9, 12

Page

Linkletter v. Walker,
381 U.S. 618 (1965) 21

Miller v. Fenton,
474 U.S. 104 (1985) 6, 19

Miranda v. Arizona,
384 U.S. 436 (1966) 7, 19, 23

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 16, 17

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 23

Reid v. Georgia,
448 U.S. 438 (1980) 15

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 22, 24, 25

Sibron v. New York,
398 U.S. 40 (1968) 16

Spinelli v. United States,
393 U.S. 410 (1969) 18

Terry v. Ohio,
398 U.S. 1 (1968) 12-14, 16, 25

Thompson v. Keohane,
__ U.S. __, 64 U.S.L.W. 4027
(Nov. 29, 1995) 7, 8, 18, 22, 23

Thompson v. Louisiana,
469 U.S. 17 (1984) 22

United States v. Cortez,
449 U.S. 411 (1981) 6, 14, 15, 18

Page

United States v. Jeffers,
342 U.S. 48 (1951) 20

United States v. Lefkowitz,
285 U.S. 452 (1932) 21

United States v. Leon,
468 U.S. 897 (1984) 19

United States v. Mendenhall,
446 U.S. 544 (1980) 23

United States v. Sokolow,
490 U.S. 1 (1989) 14, 15, 18

United States v. Spears,
965 F.2d 262 (7th Cir. 1992) 3, 20, 21

United States v. Ventresca,
380 U.S. 102 (1965) 19

Watts v. Indiana,
338 U.S. 49 (1949) 6

Statutes and Regulations

28 U.S.C. §2254(d) 7

Other Authorities

Monaghan, Henry P.,
"Constitutional Fact Review,"
85 Colum.L.Rev. 229 (1985) 16

Van Duizend, Richard, Sutton, L. Paul
& Carter, Charlotte A., THE SEARCH
WARRANT PROCESS: PRECONCEPTIONS,
PERCEPTIONS, AND PRACTICES (1983) 19

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Wisconsin is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases involving the Fourth Amendment. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of significant concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 8,700 attorneys. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to the area of criminal defense and, thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among other things, the NACDL seeks to promote the proper and fair administration of criminal justice and the continued recognition and adherence to the Bill of Rights which is necessary to sustain the quality of the American system of justice.

STATEMENT OF THE CASE

The facts are not disputed. On the morning of December 11, 1992, Michael Pautz, a Milwaukee, Wisconsin law enforcement officer, observed petitioners' car in a motel parking lot. The car was a two-door 1981 Oldsmobile with

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

California license plates. Pautz noticed the car because older model General Motors cars are allegedly easy to conceal drugs in, and because California is a "source" state for drugs. A police dispatcher informed Pautz that the owner of the car was either Miguel Ledesma Ornelas or Miguel Ornelas Ledesma; Pautz was unsure which name the dispatcher gave. J.A. 56-57.

Pautz then checked the motel registration list and learned that Ismael Ornelas and a second man had registered at 4:00 a.m. Another officer, Don Hurrle, joined Pautz. The officers requested a check of the two names on the Narcotic and Dangerous Drug Information System (NADDIS). Two "hits" were reported by NADDIS: Miguel Ledesma Ornelas was identified as a suspected heroin dealer in El Centro, California. Ismael Ornelas, Jr., was identified as a suspected cocaine dealer in Tucson, Arizona. The officers also ran a warrant check on both names, but neither person was wanted for arrest. J.A. 58.

Later in the morning, two men left the motel and got into the Oldsmobile. By then, Pautz and Hurrle had been joined by a third officer, Lyle Luedke. Luedke and Hurrle positioned their vehicles on both sides of the Oldsmobile. Officer Hurrle approached the car, identified himself as a police officer, and asked the men for identification. The driver, Saul Ornelas, produced a driver's license in that name. The passenger, Ismael Ornelas-Ledesma, produced a driver's license in the name of Ismael Ornelas. After examining the proffered licenses, the officers requested and received consent to search the car. J.A. 58.

When Officer Luedke searched the interior of the car, he noticed a loose panel in the armrest area in the rear passenger side. According to Luedke, a screw holding the vent cover was rusty, which he believed indicated that the screw had been recently removed. Luedke forced open the vent cover by removing the screw and discovered a package of

cocaine concealed inside the cavity of the car. The petitioners were then arrested. J.A. 59.

A federal magistrate denied petitioners' suppression motion. He found reasonable suspicion for an investigatory detention. The magistrate also concluded, however, that there was no probable cause to remove the vent cover and that petitioners' consent did not extend to the cavity of the car. The magistrate nevertheless held that the cocaine would have been discovered under the inevitable discovery doctrine and denied the motion. A federal district court accepted the magistrate's recommendation to deny the suppression motion, but relied upon a different legal theory. Agreeing that there was reasonable suspicion for a stop, the district court concluded that the search of the car's inner cavity was supported by probable cause. J.A. 33-35.

The Seventh Circuit, following *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992), reviewed the district court's findings of reasonable suspicion and probable cause under a clear error standard. Conceding that the issue of reasonable suspicion was "close," J.A. 65, the appellate court refused to disturb the district court's conclusion on this point. The appellate court ruled, however, that the record could not support the district court's probable cause finding. In that regard, the appellate court emphasized that Officer Luedke's testimony regarding the loose door panel was critical to the district court's probable cause finding. The magistrate, however, made no finding on the credibility of that testimony. Thus, the appellate court remanded the case to the district court to clarify whether that testimony was credible. J.A. 70-73.

On remand, the case was again referred to the magistrate, who recommended that the suppression motion be granted. The magistrate ruled that the record did not support a finding of probable cause. J.A. 83. The district court in turn rejected the magistrate's new recommendation.

While the district court conceded that the "issue [of probable cause] is a close one," J.A. 87, it reaffirmed its earlier finding that probable cause had been shown without ever conducting an evidentiary hearing. The court of appeals, applying a clear error test, upheld the district court's conclusion that there was probable cause to search the car's interior. J.A. 92.

In this Court, petitioners argue that the court of appeals should have treated the district court's holdings on reasonable suspicion and probable cause as legal conclusions subject to *de novo* review rather than as factual findings subject to a clear error test.

SUMMARY OF ARGUMENT

The Fourth Amendment proscribes unreasonable searches and seizures. A critical component of a valid search or seizure is the existence of probable cause. Under our legal system, this Court is responsible for defining the contours of probable cause. That duty requires carefully balancing the competing legal interests at stake. On the one hand, the Court has recognized that probable cause is an ancient safeguard that protects individual citizens from unfounded and arbitrary violations of their privacy and liberty. *Henry v. United States*, 361 U.S. 98, 100 (1959). On the other hand, probable cause is also designed to instruct police officers who are charged with promoting the community's legitimate law enforcement interests. As this Court has noted, the concept of probable cause is "the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

Because the existence *vel non* of probable cause (or its

companion standard, reasonable suspicion) is more than a collection of historic fact, this Court has never felt constrained to utilize a clear error standard when reviewing cases involving issues of probable cause. To the contrary, because probable cause involves the application of an objective legal standard to a given set of facts, *de novo* review has been the tradition of this Court for reviewing a lower court's finding concerning probable cause. As Chief Justice Rehnquist has described the matter, the development and definition of the probable cause norm requires that this Court "hold the balance true." *Illinois v. Gates*, 462 U.S. 213, 241 (1983).

Appellate courts should follow this same standard when they review probable cause and reasonable suspicion findings of trial courts. In concluding that clear error was proper for reviewing a district court's probable cause and reasonable suspicion findings, the court below ignored this Court's many rulings which have applied *de novo* review to the findings of lower courts.

The court below also misconstrued the significance of *Illinois v. Gates*. Although both this case and *Gates* involve probable cause determinations, the two cases arise in very different contexts. *Gates* involved the validity of a search warrant; this case involves the validity of a warrantless search. The holding in *Gates* that a magistrate's probable cause determination is entitled to deference when reviewing a search warrant ultimately rested on society's interest in encouraging the use of the warrant process. However, that rationale -- and that deference -- has no application to the sort of warrantless search at issue here. The Seventh Circuit's reliance on *Gates* is critically flawed precisely because it fails to recognize the significant differences between a probable cause finding made *ex ante* and a similar finding made *post hoc*.

Finally, the clear error rule used to review questions of

consent to search has no bearing on this case. A search is valid pursuant to consent when the individual's consent is voluntary and not a product of undue pressure. This is a question of historic fact that relates to the state of mind of the person. Probable cause and reasonable suspicion, in contrast, are objective legal norms that do not depend on the subjective views of any legal actor.

ARGUMENT

I. PROBABLE CAUSE IS A LEGAL JUDGMENT, NOT AN HISTORICAL FACT

Under this Court's well-established precedents, both probable cause and reasonable suspicion determinations involve a two-step process. First, there is an assemblage of the underlying facts. Resolving factual disputes, of course, "'is not this Court's concern.'" *Beck v. Ohio*, 379 U.S. 89, 100 (1964)(Harlan, J., dissenting), quoting *Watts v. Indiana*, 338 U.S. 49, 51-52 (1949); *Ker v. California*, 374 U.S. 23, 34 (1963). But "once such underlying factual issues have been resolved . . . the moment comes for determining whether, under the totality of the circumstances," *Miller v. Fenton*, 474 U.S. 104, 117 (1985), probable cause or reasonable suspicion exists. The second step of this process requires a legal judgment on the ultimate question: Are the facts contained in the record enough to convince a person of reasonable caution that a crime has been committed. *See Ker*, 374 U.S. at 35; *United States v. Cortez*, 449 U.S. 411, 418 (1981). That legal judgment can and should be subject to *de novo* review under the normal rules of appellate procedure, especially when core constitutional values are at stake.[2]

---

[2] The fact that the probable cause standard is intimately tied to core con-
(continued...)

This Court's recent decision in *Thompson v. Keohane*, __ U.S. __, 64 U.S.L.W. 4027 (Nov. 29, 1995), is particularly instructive on this point. The issue in *Thompson* was whether a federal habeas court should exercise *de novo* review of a state court's determination that a defendant was not in custody for *Miranda* purposes at the time of his confession, or whether the determination of custody should be regarded as a factual question entitled to a presumption of correctness in habeas proceedings under 28 U.S.C. §2254(d). By a 7-2 vote, the Court ruled in favor of *de novo* review.

The reasoning that supported the Court's holding in *Thompson* applies with equal force here. As Justice Ginsburg explained in her majority opinion:

> Two discrete inquiries are essential to the determination [of custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest

---

[2] (...continued)
stitutional values is as indisputable as the history that led to the Fourth Amendment's adoption. As this Court has frequently explained: "The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required." *Henry v. United States*, 361 U.S. at 100. The probable cause norm was designed to reverse this practice.

> or restraint on freedom of movement' of the degree associated with a formal arrest." The first inquiry, all agree, is distinctly factual. State court findings on these scene- and action-setting questions attract a presumption of correctness under 28 U.S.C. §2254(d). The second inquiry, however, call for application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a "mixed question of law and fact," qualifying for independent review.

64 U.S.L.W. at 4031 (footnotes and citations omitted).

Likewise, the issue presented by this case requires a determination of what the police knew and when they knew it. But those historical facts do not, by themselves, answer the question of probable cause. As in *Thompson*, the facts must be measured against an objective legal standard designed to preserve core constitutional values. That process, in turn, produces a legal conclusion that this Court has historically subjected to *de novo* review.

This case, therefore, does not require the Court to enunciate a new constitutional rule. It merely requires the Court to reaffirm its longstanding practice in probable cause cases.

II. PRIOR RULINGS INDICATE THAT THIS COURT APPLIES A *DE NOVO* STANDARD WHEN REVIEWING THE PROBABLE CAUSE AND REASONABLE SUSPICION CONCLUSIONS OF LOWER COURTS

Although this Court has not directly decided the issue, a review of its cases demonstrates that *de novo* review is the norm when this Court examines the probable cause and reasonable suspicion findings of lower courts.

A. This Court Has Consistently Exercised *De Novo* Review Of Probable Cause Determinations By Lower Courts When Considering The Validity Of Warrantless Searches

In *Ker v. California*, 374 U.S. 23, a nearly unanimous Court agreed that the Fourth Amendment conclusions of state courts would receive plenary review when addressed in this Court. Speaking for eight Justices, Justice Clark conceded that the Court does not consider disputed factual questions. He was emphatic, however, that the Court will "make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- *i.e.*, constitutional -- criteria established by this Court have been respected." *Id.* at 34. Applying the equivalent of a *de novo* test, the *Ker* Court "proceed[ed] to examine the *entire record*," *id.* (emphasis added), to determine whether there was probable cause to arrest Ker and whether exigent circumstances justified a warrantless, unannounced entry of Ker's home.[3]

While Justice Clark's statement in *Ker* remains the classic description of how this Court approaches lower courts' probable cause findings, the tradition of independent review of probable cause rulings predates the announcement found in *Ker*. This Court's seminal ruling in *Carroll v. United States*, 267 U.S. 132 (1925), applied a *de novo* test when deciding whether probable cause existed to search an automobile for contraband. There, the defendants were convic-

---

[3] *See* 374 U.S. at 34-41 (after an extensive review of the record, plurality found sufficient probable cause to justify arrest, and that the warrantless, unannounced entry did not violate the constitutional test of reasonableness mandated by the Fourth Amendment); *id.* at 60-63 (opinion of Brennan, J.)(*de novo* review of the record reveals insufficient exigency to justify a warrantless, unannounced entry of Ker's home).

ted of violating the National Prohibition Act. In this Court, they contended that federal prohibition officers stopped and searched their car without reasonable cause that it contained contraband. Although the *Carroll* Court did not state what level of review it was utilizing, an examination of the opinion indicates that the Court conducted an independent examination of the record.[4]

If there was any doubt after *Carroll* that a probable cause finding of a lower court was not subject to a clear error test, that doubt was surely eliminated by *Brinegar v. United States*, 338 U.S. 160. With an undisputed factual record, two lower federal courts ruled that police officers lacked probable cause to believe that Brinegar was illegally transporting liquor into Oklahoma. This Court reversed, after spending six pages examining the historic facts leading up to the seizure of Brinegar's car, and comparing those facts with the facts of *Carroll*, *see Brinegar*, 338 U.S. at

---

[4] Consideration of the probable cause issue by both the majority and dissenting Justices indicates independent review of the matter. Significantly, the majority opinion made no reference to any findings of the lower court, and it took judicial notice that Detroit was situated on the international border and an "active" locale for the distribution of illegal liquor into the country. *See* 267 U.S. at 160. Accordingly, the Court asserted:

> That the officers when they saw the defendants believed that they were carrying liquor *we can have no doubt*, and *we think* it equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. *We* do not perceive that it has any weight.

Id. (emphasis added). Similarly, the dissenting Justices asserted: "The facts known by the officers who arrested [the defendants] were *wholly insufficient* to create a reasonable belief that they were transporting liquor contrary to law." *Id.* at 171 (emphasis added).

165-71.[5] In a noteworthy passage, the Court explained that unless there are significant variations in the facts of cases, "it cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Id.*[6]

After this trenchant statement, the *Brinegar* majority explained that the probable cause rule protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while at the same time giving "fair leeway for enforcing the law in the community's protection." *Id.* at 176. While some cases may present close questions, "a line necessarily must be drawn by an act of judgment formed in the light of the particular situation and the account taken of all the circumstances." *Id.* (emphasis added).

Similarly, in *Beck v. Ohio*, 379 U.S. 89, a majority of the Court reversed a ruling by the Ohio Supreme Court upholding Beck's arrest and the subsequent search of his car.

---

[5] Justice Jackson's dissent took the position that the majority was conducting plenary review. 338 U.S. at 187 (Jackson, J., dissenting)(noting that the majority had drawn inferences from the facts that the two lower courts, presumably in a better position to review those facts, had refused to draw).

[6] *Cf. Elkins v. United States*, 364 U.S. 206, 223-24 (1960), where, in the context of overruling the "silver platter" doctrine, the Court explained:

> In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."

In this Court, Beck argued that his arrest was not supported by probable cause. In resolving this issue, the *Beck* Court looked to the standard articulated by Justice Clark in *Ker*. *Beck*, 379 U.S. at 92, quoting *Ker*, 374 U.S. at 34.

After acknowledging that the trial court made no factual findings on the issue of probable cause and commenting on the "meager" state of the record, *Beck*, 379 U.S. at 92-93, the *Beck* majority undertook an independent examination of the record, including a review of the testimony of one of the arresting officers, and concluded that Beck's arrest was not supported by probable cause. *Id.* at 93-97.

In an incisive dissent, Justice Harlan was mildly critical of the majority for not giving greater deference to state court factual findings that involve contested factual matters, or "on-the-spot considerations which no appellate court can estimate with assurance on a cold record." *Id.* at 101. But where the factual record is clear, Justice Harlan agreed that de novo review was proper. He wrote: "It is equally clear that in cases involving asserted violations of constitutional rights the Court is free to draw its own inferences from established facts, giving due weight to the conclusions of the state court, but not being conclusively bound by them." *Id.* at 100 (citations omitted).

B. This Court Applies A *De Novo* Test When Analyzing The Constitutionality Of Less Intrusive Detentions And Searches

While the Court normally requires probable cause for full scale seizures and searches, it has also recognized that a lesser degree of suspicion may support a detention or search that is minimally intrusive. The landmark ruling in *Terry v. Ohio*, 398 U.S. 1 (1968), held that a limited frisk of a person was permissible where a police officer reasonably suspects the individual is engaged in criminal conduct and is

presently armed and dangerous. *Id.* at 30. Although *Terry* was a sharp break from precedent in its willingness to allow a police intrusion in the absence of probable cause, it forcefully asserted that the lesser degree of suspicion it was proposing for limited intrusions derived its meaning from fundamental Fourth Amendment principles.[7] Thus, Chief Justice Warren cautioned:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Id. at 21-22 (footnotes and citations omitted).

After *Terry* was decided, state and lower federal judges were confronted with a myriad of fact patterns that raised difficult questions about the scope and limits of the *Terry* doctrine. As many of these cases came to this Court, there was an obvious need to provide guidance to the rest of the

---

[7] At the core of *Terry*'s willingness to allow searches and seizures on less than probable cause was the constitutional mandate that distinctive and prudent evidence support such intrusions. 398 U.S. at 21, n.18 ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence"). This statement indisputably reflects the legal nature of the reasonable suspicion standard.

judiciary on the meaning of *Terry*. When reviewing those cases, this Court has never applied a clear error test when confronted with a claim that reasonable suspicion did not support a challenged detention.

For example, in *United States v. Cortez*, 449 U.S. 411, this Court reversed the court of appeals' conclusion that reasonable suspicion was lacking to justify a detention of the defendants' vehicle. *Cortez* explained that the legal concept of reasonable suspicion contains two elements. First, there is an assessment of all of the historic facts, information and experience possessed by the law enforcement officers. After the totality of the circumstances have been assembled, then there is a judicial judgment of whether the "whole picture . . . yield[s] a particularized suspicion" that justifies subjecting the individual to the challenged intrusion. Applying this framework, the *Cortez* Court conducted its own extensive review of the factual record, *see id.* at 418-21, and decided that the record contained sufficient evidence to justify stopping the defendants.[8]

Recent decisions continue the tradition of independent review of a lower court's finding on reasonable suspicion. These cases recognize that the concept of reasonable suspicion is a legal precept, rather than a description of historic fact. One example is *United States v. Sokolow*, 490 U.S. 1 (1989). *Sokolow* reversed a determination by the Ninth Circuit that federal drug enforcement agents did not have reasonable suspicion to detain Sokolow. The appellate court

[8] Interestingly, the appellate court stated that it applied clear error review on the question of reasonable suspicion. While the *Cortez* Court acknowledged that fact, 449 U.S. at 416, quoting 595 F.2d 505, 507 (9th Cir. 1979), it abstained from endorsing that standard. On the contrary, the *Cortez* Court's lengthy recounting and meticulous scrutiny of the facts suggests that the Court felt free to render its own independent judgment of the quantum and quality of the evidence in the record.

had ruled that, unless evidence of "'ongoing criminal activity,' such as the use of an alias or evasive movement through an airport," was exhibited by a suspect, *id.* at 6, quoting 831 F.2d 1413, 1419 (9th Cir. 1987), a temporary seizure was impermissible.

Speaking for the majority, Chief Justice Rehnquist explained that "[t]he concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" 490 U.S. at 7, quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Rather than turning on the factual characterization of different types of behavior, the Chief Justice instructed that the concept of reasonable suspicion depends on the "probative value" and "evidentiary significance" of the facts in the record. Put simply, the legal norm of reasonable suspicion, like the legal principle of probable cause, depends on "'the *degree of suspicion* that attaches to particular types of noncriminal acts.'" *Sokolow*, 490 U.S. at 10, quoting *Gates* at 243-44, n.13 (emphasis added). With these legal principles in mind, the *Sokolow* Court then reviewed the facts and independently found sufficient proof to uphold the temporary seizure of Sokolow.[9]

[9] In contrast to the situation in *Cortez*, the lower court in *Sokolow* stated that it was applying *de novo* review on the issue of reasonable suspicion. 831 F.2d at 1417 (footnote and citations omitted). Although this Court did not expressly approve or disapprove of the standard utilized below, it obviously did not hesitate to reverse the Ninth Circuit's legal conclusion and exercised its own independent assessment of the reasonable suspicion question without any deference to the contrary finding below. *See also Reid v. Georgia*, 448 U.S. 438, 441 (1980)(*per curiam*)(reversing lower court finding of reasonable suspicion; concluding that the officer "could not, *as a matter of law*, have reasonably suspected the petitioner of criminal activity" on the basis of the facts in the record) (emphasis added); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984)(*per curiam*)(reversing lower court's conclusion that there was no reasonable suspicion supporting the detention of the defendants).

As the above cases teach, *de novo* review of the reasonable suspicion norm is important because it guarantees a consistent, case-by-case development of Fourth Amendment rules. Indeed, *de novo* review is indispensable because of the "exceedingly small number of cases in this Court indicating what suffices for probable cause [or reasonable suspicion]." *Sibron v. New York*, 398 U.S. 40, 74 (1968)(Harlan, J., concurring in result). Although the concepts of probable cause and reasonable suspicion involve an initial collection of historic fact and experience, this point should not prompt the Court to alter its traditional process of independently reviewing the ultimate legal question at stake.[10] As Professor Monaghan has noted, *de novo* review is necessary because "norm elaboration occurs best when the Court has power to consider fully a series of closely related situations involving a claim of constitutional privilege." Henry P. Monaghan, "Constitutional Fact Review," 85 Colum.L. Rev. 229, 273 (1985). *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), illustrates how the Court combines a case-by-case model and *de novo* review when interpreting the Fourth Amendment.

In *T.L.O.*, this Court addressed for the first time the application and scope of the Fourth Amendment concerning searches and seizures by public school officials. The New

[10] *See Alabama v. White*, 496 U.S. 325 (1990). In *White*, the Alabama Court of Criminal Appeals, after a careful review of the facts and record, *see* 550 So. 1074, 1078-79 (1989), reversed a trial court's order denying White's suppression motion. The Alabama appellate court found that an anonymous tip, notwithstanding subsequent police corroboration of certain details, did not provide reasonable suspicion to justify a *Terry* stop. Acknowledging that the issue of reasonable suspicion in *White* was "a close case," *White*, 496 U.S. at 332, this Court reversed the lower court and found, without any deference to the opposite finding below, that the anonymous tip, as corroborated, justified a stop of the defendant's car.

Jersey Supreme Court had found that the search of T.L.O.'s purse was unreasonable under the facts of the case. In reversing the decision of the New Jersey court, this Court announced that the constitutionality of a school search depends on "the reasonableness, under all the circumstances, of the search." *Id.* at 341-42. If clear error review was the proper method for interpreting Fourth Amendment norms, one might have expected a remand of *T.L.O.* to provide the New Jersey courts an opportunity to analyze the facts under the Court's new standard. Instead, recognizing that the New Jersey Supreme Court had applied a legal standard "not substantially different from the standard" it had adopted, *id.* at 343, this Court reached a different legal conclusion after independently examining the facts and found sufficient evidence to validate the challenged search. *Id.* at 343-48.

III. *ILLINOIS v. GATES* DID NOT ALTER THE TRADITIONAL METHOD FOR REVIEWING PROBABLE CAUSE AND REASONABLE SUSPICION DETERMINATIONS INVOLVING WARRANTLESS INTRUSIONS

A. Using A Totality Of The Circumstances Test To Evaluate Probable Cause And Reasonable Suspicion Determinations Does Not Conflict With The Requirement Of *De Novo* Review

Illinois v. Gates, 462 U.S. 213, concerned whether a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous tip could satisfy the probable cause rule. *Gates* reaffirmed that probable cause is to be judged from the totality of the circumstances.[11] Although

[11] 462 U.S. at 238. As is the case with probable cause, reasonable suspi-
(continued...)

Gates found "it is wiser to abandon the 'two-pronged test'" for judging probable cause findings established in previous decisions,[12] it did not disturb the longstanding principle that the probable cause determination remains an objective test.[13] Similarly, a temporary detention or limited search is permissible only where the evidence indicates an "objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[14]

Gates also reiterated that a magistrate's probable cause finding was entitled to substantial deference. 462 U.S. at 236. But contrary to the Seventh Circuit's view, the reaffirmation of a totality of the circumstances test for determining probable cause in *Gates* does not imply deferential review for judging the evidence supporting a warrantless police intrusion.[15] Indeed, *Gates* can most fairly be read to point

---

[11] (...continued)
cion is also judged by a totality of the circumstances rule. *See Alabama v. White*, 496 U.S. at 332 ("[W]e concluded that under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car"); *Sokolow*, 490 U.S. at 8 (when evaluating the constitutionality of a detention, "we must consider 'the totality of the circumstances -- the whole picture'"), quoting *Cortez*, 449 U.S. at 417.

[12] The so-called "two-pronged" test for determining probable cause emerged from the reasoning of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).

[13] *See, e.g., Brinegar*, 338 U.S. at 175 ("Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed")(citation omitted)(brackets in original); *Illinois v. Rodriguez*, 497 U.S. 177, 184-86 (1990).

[14] *Cortez*, 411 U.S. at 417 (footnote and citation omitted).

[15] *See Thompson v. Keohane*, 64 U.S.L.W. at 4031 n.11 (use of a totality (continued...)

in precisely the opposite direction. The intent of *Gates* was to encourage use of the warrant process.[16] Accordingly, the criticism in *Gates* of *de novo* review was directed at the type of "grudging or negative" and "hypertechnical" review that might well prompt police officers to forgo the warrant process. *Id.* at 236. Where officers engage in warrantless searches, however, the *raison d'etre* for great deference to the magistrate is gone. An officer's belief that probable cause or reasonable suspicion existed is not enough. While police officers are entitled to draw "the usual inferences which reasonable men draw from evidence," *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), when they act outside of the warrant process, their subjective beliefs are not enough.[17]

---

[15] (...continued)
standard for deciding whether a person is in custody under *Miranda v. Arizona*, 384 U.S. 436 (1966), does not mean deferential review is proper); *Miller v. Fenton*, 474 U.S. at 117 (employing a totality standard for deciding whether a confession is voluntary under the Fifth Amendment's Due Process Clause does not preclude independent review by federal habeas court).

[16] 462 U.S. at 236. It is well known that many police officers prefer to bypass the warrant process. *See, e.g.*, Richard Van Duizend, L. Paul Sutton & Charlotte A. Carter, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 66 (1983). Many of this Court's cases, including *Gates*, have tried to counter this phenomenon. *See, e.g., United States v. Leon*, 468 U.S. 897 (1984)(holding that where an officer has acted in objective reliance on a search warrant issued by a neutral and detached magistrate, evidence secured pursuant to warrant is admissible at trial even if it is later determined that the warrant was issued without probable cause); *United States v. Ventresca*, 380 U.S. 102 (1965)(in a close or marginal situation, a search authorized by a warrant may be upheld where without one it would fail).

[17] *Beck*, 379 U.S. at 97 ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people (continued...)

B. Seventh Circuit Rulings Ignore This Court's Longstanding Preference For A Magistrate's Approval Before An Intrusion Instead Of The Warrantless Decision To Search And Seize

The reasoning supporting the Seventh Circuit's adoption of a clear error standard is not only out of step with the purposes announced in *Gates*, it also ignores critical considerations that have informed this Court's judgment when explaining the meaning and value of the probable cause norm. In the case that provides the foundation for the ruling below, the Seventh Circuit opined that, because a magistrate's warrant is owed substantial deference, even though it is issued after an *ex parte* hearing,

> it would be anomalous to require a more searching review of a district judge's probable cause determination. Because there is little to distinguish a magistrate's probable cause determination in a warrant case and a district judge's probable cause determination in a non-warrant case, appellate review should be the same for both.

United States v. Spears, 965 F.2d at 270 (citation omitted).

The flaw in this reasoning is the failure to recognize the significant differences between a probable cause finding made *ex ante* and a similar finding made *post hoc*. First, a magistrate's finding of probable cause is the preferred mode because it "interposes an orderly procedure,"[18] overseen by

---

[17] (...continued)
would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police").

[18] *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

a neutral and detached official, rather than a process generated by the "hurried action of officers and others who may happen to make arrests [or searches]."[19] In addition, the *ex ante* probable cause finding is favored because it allows an objective evaluation of the need to search *before* an intrusion of privacy occurs.[20]

The Seventh Circuit correctly notes that the degree of evidence needed to support a probable cause finding is the same whether made a magistrate in an *ex parte* hearing, or made by a district court after-the-fact. *Spears*, 965 F.2d at 270. But this truism forgets that the warrant process protects and encourages constitutional values that are lost and become irreplaceable once officers act on their own. An *ex ante* process ensures that a record of the need to intrude is compiled before the intrusion. This not only diminishes the opportunity for potential police misconduct, it also guarantees that the probable cause finding will not occur in the "far less reliable procedure of an after-the-event justification for the arrest or search, [which is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck*, 379 U.S. at 96. Thus, the rationale that underlies the decision below has neglected bedrock considerations put in place by this Court to ensure that the probable cause rule is applied in an objective manner that protects individual liberty without unduly restraining legitimate law enforcement interests. *De novo* review promotes the ultimate goal of this process, which is an objective judgment on whether law enforcement officers have adhered to constitu-

---

[19] *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

[20] It has been said that once an unreasonable intrusion has occurred, an after-the-fact remedy -- whether in the guise of the exclusionary rule or a damages actions brought against the offending officers -- may offer little solace or relief for the constitutional harm because "[r]eparation comes too late." *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

tional commands. Moreover, *de novo* review offers the additional advantage of providing guidance to the police, helps to unify precedent and stabilizes the contours of constitutional principles. *Thompson v. Keohane*, 64 U.S.L.W. at 4032.

IV. THE CLEAR ERROR TEST USED TO REVIEW QUESTIONS OF CONSENT UNDER THE FOURTH AMENDMENT IS NOT RELEVANT TO THIS CASE

A. The Issue Of Consent Concerns A Suspect's Mental State

As the Court's cases show, the determination of probable cause involves no inquiry into the subjective state of mind of a legal actor. Moreover, the standard for reviewing a finding of consent has no bearing on this case. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973), this Court described the question of consent to search as factual in nature and implied that a finding of consent was subject to clear error review. Such a standard makes sense because courts determine consent by asking whether undue pressure affected an individual's mental state and thus played a role in the procurement of consent. "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Id.* at 227. Accordingly, a trial court's finding of consent is given the same deference afforded other findings that "depend[] heavily on the trial court's appraisal of witness credibility and demeanor." *Thompson v. Keohane*, 64 U.S.L.W. at 4030; *cf. Thompson v. Louisiana*, 469 U.S. 17, 23 (1984)(*per curiam*)(the issue of consent "is ordinarily a factual issue unsuitable for [the Court's]

consideration in the first instance").[21]

In contrast, the probable cause and reasonable suspicion norms are considered under an objective standard that asks "whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n.19 (1982). The subjective beliefs of the police are not relevant. *Beck*, 379 U.S. at 97. Therefore, the determination of either of these Fourth Amendment norms, like the determination of whether a person has been seized within the meaning of the Fourth Amendment, is a conclusion of law meriting *de novo* review.[22]

---

[21] The institutional and efficiency concerns that have moved the Court to defer to the factual findings of lower courts on questions like juror bias and competency are not controlling in the context of Fourth Amendment suppression motions. Only judges or magistrates decide the relevant legal questions, "and they do so with a view to identifying recurrent patterns, and advancing uniform outcomes." *Thompson v. Keohane*, 64 U.S.L.W. at 4031 n.13. In this case, the district court decided the petitioners' probable cause claim without conducting an evidentiary hearing. J.A. 29, n.1; J.A. 86. *See Thompson*, 64 U.S.L.W., n.12 (noting that a trial court's superior capacity to resolve credibility issues on the issue of custody of *Miranda* is not a concern when the trial court resolves that issue without conducting an evidentiary hearing).

[22] *Cf. United States v. Mendenhall*, 446 U.S. 544, 551-52, n.5 (1980) (opinion of Stewart, J.)("[T]he correctness of the legal characterization of the facts appearing in the record [on whether a seizure occurred] is a matter for this Court to determine")(citations omitted); *id.* at 565, n.5 (Powell, J., concurring in part and concurring in the judgment)(referring to the district court's finding of reasonable suspicion as a "conclusion of law").

B. When The Overall Reasonableness Of Police Behavior Is At Issue, The Rationale Of *Bustamonte* Has Been Confined To Purely Factual Questions

Furthermore, it would be illogical to draw from *Bustamonte* the broader proposition that probable cause and reasonable suspicion are factual findings entitled to clear error review when this Court has limited the applicability of this level of review to the narrow question of whether consent was in fact given. When faced with the larger question of the validity of consent to a search based upon the reasonable, but mistaken, view that a third party possessed common authority over the premises, this Court has made it clear that an objective standard applies and the conclusions drawn under that standard are conclusions of law.

In *Illinois v. Rodriguez*, 497 U.S. 177, the lower courts found that, because Rodriguez' ex-girlfriend did not possess common authority over the apartment she and Rodriguez had once shared, the police could not reasonably rely on her apparent authority to consent to search the home. This Court reversed that conclusion. Speaking for the majority, Justice Scalia conceded that the question whether an officer has a reasonable belief of a third-party's common authority to consent to a search "is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment." *Id.* at 186. But the factual nature of the issue did not compel deference to the lower courts' Fourth Amendment conclusions.

On the contrary, the Court held that a mistaken police judgment on the issue of third-party consent does not vitiate the search provided the mistake is a reasonable one. As explained in *Rodriguez*:

> [Prior cases establish] that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable . . . .
>
> As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief'" that the consenting party had authority over the premises?

Id. at 188, quoting *Terry v. Ohio*, 392 U.S. at 21-22.

Similarly, in *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), the Florida courts had ruled that consent to a general search of a car did not extend to sealed containers found inside the car. This Court reversed and held that a search is valid when, "under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile." *Id.* at 249. Though this standard requires an assessment of all the facts available to an officer, *Jimeno* did not imply that deferential review was proper. *Jimeno* explained that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* at 251.

The use of an objective standard in both *Rodriguez* and *Jimeno* is not surprising. Those decisions simply follow a tradition of independent review of lower court legal findings. Rather than suggesting that clear error is proper for this case, the reasoning of *Bustamonte* has been confined to questions concerning a historic fact relating to an actor's mental state.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

Tracey Maclin
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Of Counsel:

Barbara E. Bergman
University of New Mexico
School of Law
1117 Stanford N.E.
Albuquerque, New Mexico 87131
(505) 277-3304

Dated: December 20, 1995

AMICUS CURIAE

BRIEF

(10)

No. 95-5257

Supreme Court, U.S.
FILED
JAN 12 1996
CLERK

In The
Supreme Court of the United States
October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF AFFIRMANCE OF THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS BELOW.

(List of Counsel on Inside Front Cover)

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BRIEF OF AMICI CURIAE 1

INTEREST OF AMICI CURIAE 2

ARGUMENT 3

IN NON-WARRANT CASES, APPELLATE COURTS SHOULD NOT CONDUCT A *DE NOVO* STANDARD OF REVIEW CONCERNING REASONABLE SUSPICION TO STOP AND PROBABLE CAUSE TO SEARCH; A UNIFORM STANDARD OF NO *DE NOVO* REVIEW SHOULD APPLY TO BOTH WARRANT AND NON-WARRANT CASES 3

CONCLUSION 8

TABLE OF AUTHORITIES

Cases **Page**

Illinois v. Gates, 462 U.S. 213 (1983) 4, 6
Miranda v. Arizona, 384 U.S. 436 (1966) 6
New York v. Belton, 453 U.S. 454 (1981) 4
Terry v. Ohio, 392 U.S. 1 (1968) 4
Thompson v. Keohane, 116 S.Ct. 457 (1995) 6
United States v. Green, 113 S.Ct. 1835 (1993) 6
United States v. Ornelas-Ledesma, 16 F.3d 714 (7th Cir. 1994) 3
United States v. Spears, 965 F.2d 262 (7th Cir. 1992) 4, 5, 7

Article

"Miranda v. Arizona—Is It Worth the Cost?," 24 *Calif. Western Law Rev.* 185-200 (1987-1988) 6

No. 95-5257

In The
Supreme Court of the United States
October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF AFFIRMANCE OF THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS BELOW.

This Brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioners and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over one hundred times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

Amici are national professional associations representing the interests of law enforcement and prosecutorial agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing the process of stop and frisk, arrest and search and seizure within the bounds of the law, as well as training and the formulation of administrative guidance on this subject, and (2) prosecutors and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute crimes and

represent the states on appellate review of cases involving evidence obtained as a result thereof.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

ARGUMENT

IN NON-WARRANT CASES, APPELLATE COURTS SHOULD NOT CONDUCT A *DE NOVO* STANDARD OF REVIEW CONCERNING REASONABLE SUSPICION TO STOP AND PROBABLE CAUSE TO SEARCH; A UNIFORM STANDARD OF NO *DE NOVO* REVIEW SHOULD APPLY TO BOTH WARRANT AND NON-WARRANT CASES.

In this case Milwaukee, Wisconsin, police suspected that two people in a car with California license plates were drug dealers. They followed them into a motel and obtained one of their names from the registry and another from automobile records. They then ran both names through "NADDIS," the Narcotic and Dangerous Drug Information System operated by the Drug Enforcement Administration (DEA). DEA came back with two "hits"; the names corresponded "more or less to names of suspected drug dealers in the NADDIS database . . ."

Although the magistrate judge and trial court were given no information on the reliability of the NADDIS system, the Seventh Circuit Court of Appeals, in *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir. 1994), concluded that there was reasonable suspicion for the police to make an investigative stop of the pair as they were leaving the motel.

The defendants filed for review with this Court, requesting

a consideration of two questions, i.e.:

I. In non-warrant cases, should appellate courts conduct a *de novo* standard of review concerning reasonable suspicion to stop and probable cause to search?

II. Was it a violation of defendants' due process rights for the trial court to refuse access to the raw data comprising the NADDIS check, which was later used to justify both the stop and the search?

In granting review, this Court confined itself to question I, *supra*. *Amici* submit that the issue is a very important one for search and seizure law. The Seventh Circuit had previously adopted a "clear error" standard of review in *search warrant* cases, i.e., deferring to the findings below and not conducting a *de novo* review on appeal on the issue of probable cause unless there were "clear error." *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992).

If the Court adopts the same rule for *warrantless* stops, frisks, and searches, it would clarify the procedural law with respect to appellate review of search and seizure probable cause issues, including the rules with respect to investigative stops under *Terry v. Ohio*, 392 U.S. 1 (1968). It would also be of great assistance to law enforcement officers who need help, and not hindrance, in their daily work. It would provide clear guidance to the police through a uniform system of Fourth Amendment jurisprudence and carry forward the Court's emphasis upon "bright line" rules for police, an emphasis which was initiated in *New York v. Belton*, 453 U.S. 454 (1981), as urged by *amici* in several cases before this Court in the last 15 years.

Amici submit that the type of question involved in this case is essentially a question of fact. As such, using the "totality of the circumstances" approach established by this Court in *Illinois v. Gates*, 462 U.S. 213 (1983), the suppression level and trial courts are in the best position to resolve these factual issues.

As noted in *Spears*, *supra*,

> The question . . . is the same: did probable cause exist? The [United States Supreme] Court tells us that "[p]robable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925)). It is a legal conclusion, dependent solely on a factual analysis: the facts are what the police knew and did; the finding of probable cause is a conclusion that those facts meet the legal criteria for probable cause. So the question for us is whether this finding should be reviewed deferentially, as ordinary findings of fact are, or *de novo*, as ordinary legal rulings are.
>
> . . .
>
> . . . All we are doing today is announcing one standard of review for all reasonable searches. This is not as big a step as it appears at first blush. We already review exigent circumstances cases for clear error. *See, e.g., United States v. Sewell*, 942 F.2d 1209, 1213 (7th Cir. 1991). The same is true of consent cases. *See, e.g., United States v. Berk*, 930 F.2d 1219, 1221 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 269, 116 L.Ed.2d 221 (1991). By our action today we simply bring probable cause-based non-warrant cases in line with the rest of our Fourth Amendment reasonable search jurisprudence. And in line with three of our sister circuits, who likewise review probable cause determinations for clear error. *See United States v. Fox*, 902 F.2d 1508, 1513 (10th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 199, 112 L.Ed.2d 161 (1990); *United States v. Williams*, 897 F.2d 1430, 1435 (8th Cir. 1990); *United States v. Santana*, 895 F.2d 850, 852 (1st Cir. 1990).

United States v. Spears, supra, at 270-271.

Amici note that, as with the determination of the issues surrounding the prophylactic rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), independent review by appellate courts at both state and federal levels of questions of fact is not only unnecessary on the basis of Fourth Amendment and *Miranda* rule jurisprudence, but also unwise from a judicial policy standpoint. The appellate courts simply do not have the resources to re-examine questions of fact in Fourth Amendment cases. Opening the door to *de novo* review of such issues will open a chapter of judicial involvement in the minutiae of fact issues similar to that plaguing our courts in *Miranda* cases, as chronicled in the study on the impact of *Miranda's* prophylactic rule upon the appellate courts in "Miranda v. Arizona—Is It Worth the Cost?," 24 *Calif. Western Law Rev.* 185-200 (1987-1988). As *amici* pointed out in our brief filed with this Court in *United States v. Green*, 113 S.Ct. 1835 (1993) (petition for certiorari dismissed upon death of respondent), the appellate courts are not only unequipped to deal with such questions of fact, but frequently their chorus of uncoordinated voices leaves the police with virtually no "bright line" guidance on factual issues.

The problem is the same in Fourth Amendment cases as in *Miranda* prophylactic rule cases. If the Court sanctions *de novo* review in this case, it will open a large Pandora's Box of inconsistent appellate rulings in Fourth Amendment cases and leave the police with little or no guidance at the level of the courts in which their work is largely involved, i.e., the suppression and trial level courts. It would do disservice to the principle articulated by this Court in *Gates, supra*, 462 U.S. at 232, 103 S.Ct. at 2329, that "probable cause is a fluid concept —turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a set of legal rules." The Court would introduce into Fourth Amendment jurisprudence the multiplicity of levels of review of essentially fact issues that now exists in *Miranda* cases. *Thompson v. Keohane*, 116 S.Ct. 457 (1995).

> As concluded wisely by the court below:
> In both cases [warrant and warrantless], if there is probable cause, the search is reasonable and does not violate the Fourth Amendment. If there is no probable cause, the factfinder at trial will not consider the evidence, either because the warrant did not issue, or the exclusionary rule operates to keep it out. It is the front-line judicial officer in both cases who conducts the initial inquiry, who concludes there is or is not probable cause, and an appellate panel should not substitute its judgment in either case.
> *United States v. Spears, supra,* at 271.

Amici submit on behalf of law enforcement officers, administrators, and counsel, that affirmance of the decision below is consonant with established case law, sound judicial policy, and the need to provide law enforcement with bright line rules that can be effectively applied at the street level. To rule otherwise will be to create a new era of confusion and inconsistency in Fourth Amendment jurisprudence at the state and federal appellate levels similar to that which presently exists in the area of *Miranda's* prophylactic rule case law. We respectfully ask the Court not to launch the nation's appellate courts upon this fruitless endeavor.

CONCLUSION

Amici urge this Court to affirm the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

OF COUNSEL:
MICHAEL P. BARNES, ESQ.
Prosecuting Attorney
South Bend, Indiana
President
National District Attorneys
Association, Inc.
99 Canal Center Plaza
Suite 510
Alexandria, Virginia 22314

BERNARD J. FARBER, ESQ.
1126 West Wolfram, Rear
Chicago, Illinois 60657-4330

Counsel for Amici Curiae
FRED E. INBAU, ESQ.
John Henry Wigmore Professor
of Law, Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland Ave.
Suite 1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue,
Suite 100
Glen Ellyn, Illinois
60137-4900
Tele and Fax: (708) 858-6392

No. 95-5257

Supreme Court, U.S.
FILED
FEB 22 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT

PETER D. ISAKOFF *
(Amicus Curiae, invited by Court, per Order of December 4, 1995)
DAVID A. HICKERSON
WEIL, GOTSHAL & MANGES LLP
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 682-7000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

39 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly reviewed the district court's determinations that there was reasonable suspicion for the investigatory stop and probable cause for the automobile search under the clearly erroneous standard rather than de novo.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	9
THE COURT OF APPEALS WAS CORRECT IN APPLYING THE CLEARLY ERRONEOUS STANDARD IN REVIEWING THE DISTRICT COURT'S RULINGS THAT REASONABLE SUSPICION SUPPORTED THE STOP AND PROBABLE CAUSE SUPPORTED THE AUTOMOBILE SEARCH	9
A. Developing the Standard of Appellate Review	10
B. Appellate Review of Probable Cause and Reasonable Suspicion Determinations	17
C. This Court's Prior Decisions	25
D. Fourth Amendment Values	29
E. Anomalies That Would Result From De Novo Review	30
CONCLUSION	33

TABLE OF AUTHORITIES

Cases	Page
Adams v. Williams, 407 U.S. 143 (1972)	19
Aguilar v. Texas, 378 U.S. 108 (1964)	7, 18, 20
Alabama v. White, 496 U.S. 325 (1990)	20
Anderson v. Bessemer City, 470 U.S. 564 (1985)	11, 15, 17, 24
Anderson v. Creighton, 483 U.S. 635 (1987)	28
Beck v. Ohio, 379 U.S. 89 (1964)	18, 25, 26
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	11, 14, 26, 29
Brinegar v. United States, 338 U.S. 160 (1949)	19, 20, 27
Campbell v. United States, 373 U.S. 487 (1963)	11
Carroll v. United States, 267 U.S. 132 (1925)	27
Commissioner v. Duberstein, 363 U.S. 278 (1960)	15, 21
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)	10, 13, 15, 16
Curley v. United States, 160 F.2d 229 (D.C. Cir.), *cert. denied sub nom. Smith v. United States*, 331 U.S. 837 (1947)	31
Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979)	29
First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995)	13
Glasser v. United States, 315 U.S. 60 (1942)	31
Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989)	14, 29
Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986)	26, 27
Illinois v. Gates, 462 U.S. 213 (1983)	*passim*
In re Winship, 397 U.S. 358 (1970)	31
Jackson v. Virginia, 443 U.S. 307 (1978)	9, 31, 32
Ker v. California, 374 U.S. 23 (1963)	25, 26
Levinson v. Spector Motor Service, 330 U.S. 649 (1947)	27
Locke v. United States, 11 U.S. (7 Cranch) 339 (1813)	17
Maggio v. Fulford, 462 U.S. 111 (1983)	14
Maine v. Taylor, 477 U.S. 131 (1986)	11
Massachusetts v. Upton, 466 U.S. 727 (1984)	31
Miller v. Fenton, 474 U.S. 104 (1985)	11, 13, 14, 29
Nathanson v. United States, 290 U.S. 41 (1933)	22

TABLE OF AUTHORITIES—Continued

	Page
Nix v. Williams, 467 U.S. 431 (1984)	5
Patton v. Yount, 467 U.S. 1025 (1984)	14, 15
Payne v. Tennessee, 501 U.S. 808 (1991)	25
Pierce v. Underwood, 487 U.S. 552 (1988)	13, 16, 21
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	12, 14
Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974)	10
Salve Regina College v. Russell, 499 U.S. 225 (1991)	13, 14, 15, 16
Spinelli v. United States, 393 U.S. 410 (1969)	7, 18, 19
Stone v. Powell, 428 U.S. 465 (1976)	9, 25, 32
Terry v. Ohio, 392 U.S. 1 (1968)	20, 28
Texas v. Brown, 460 U.S. 730 (1983)	6
Thompson v. Keohane, 116 S. Ct. 457 (1995)	11, 14
Townsend v. Sain, 372 U.S. 293 (1963)	14
United States v. Adebayo, 985 F.2d 1333 (7th Cir.), *cert. denied*, 113 S. Ct. 2947 (1993)	9
United States v. Cortez, 449 U.S. 411 (1981)	6, 19, 25, 28
United States v. First City National Bank, 386 U.S. 361 (1967)	10
United States v. Leon, 468 U.S. 897 (1984)	30
United States v. McConney, 728 F.2d 1195 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984)	9
United States v. McKinney, 919 F.2d 405 (7th Cir. 1990)	31
United States v. Normandeau, 800 F.2d 953 (9th Cir. 1986)	9
United States v. Padro, 52 F.3d 120 (6th Cir. 1995)	10
United States v. Raddatz, 447 U.S. 667 (1980)	6, 10
United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991), *cert. denied*, 502 U.S. 1030 (1993)	10
United States v. Sangineto-Miranda, 859 F.2d 1501 (6th Cir. 1988)	10
United States v. Sims, 975 F.2d 1225 (6th Cir. 1992), *cert. denied sub nom. Gardner v. United States*, 507 U.S. 932 (1993)	10

TABLE OF AUTHORITIES—Continued

	Page
United States v. Sokolow, 490 U.S. 1 (1989)	20, 28
United States v. Spears, 965 F.2d 262 (7th Cir.), *cert. denied*, 506 U.S. 989 (1992)	5, 9, 31
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	11
United States v. Ventresca, 380 U.S. 102 (1965)	30
United States v. Williams, 949 F.2d 220 (6th Cir. 1991), *cert. denied*, 504 U.S. 958 (1992)	10
United States v. Zapata, 18 F.3d 971 (1st Cir. 1994)	10
Williams v. United States, 500 U.S. 901 (1991)	10
Wilton v. Seven Falls Co., 115 S. Ct. 2137 (1995)	13, 23

Constitution, Statutes and Rules

U.S. Const.:	
Amend I	14, 29
Amend IV	*passim*
18 U.S.C. § 3731	30
28 U.S.C. § 636	6, 24
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254(d)	14
Fed. R. Civ. P.:	
Rule 11	15
Rule 52(a)	11, 27

Miscellaneous

J. Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1927)	13
Henry M. Hart, Jr. and Albert M. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* (1994)	12
Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985)	12
M. Rosenberg, *Judicial Discretion of the District Court, Viewed from Above*, 22 Syracuse L. Rev. 635 (1971)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-5257

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT

OPINIONS BELOW

The order of the court of appeals affirming petitioners' convictions (J.A. 91-92) is unreported. The judgment (J.A. 93) is noted at 52 F.3d 328 (table). The earlier opinion of the court of appeals vacating the convictions and remanding for further proceedings (J.A. 55-73) is reported at 16 F.3d 714. The recommendations of the magistrate judge (J.A. 7-27, 76-84) and the opinions and orders of the district court (J.A. 28-36, 74-75, 85-90) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1995. J.A. 93. The petition for a writ of certiorari was filed on July 17, 1995, and was granted

(limited to question 1) on November 6, 1995. J.A. 94. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises from the discovery of two kilograms of cocaine in the course of an automobile search conducted by Milwaukee County Deputy Sheriffs on December 11, 1992. R 4:1-2.[1] Michael Pautz, a twenty-year veteran assigned to the Drug Enforcement Unit, was engaged in a routine survey of the Suburban Motel parking lot, when a 1981 two-door Oldsmobile with California plates parked outside Room 4 drew his attention. J.A. 9. Based upon his training and experience, Pautz knew that California is a major drug trafficking source state, and that older two-door General Motors vehicles are favorites of drug couriers because of their spacious hidden cavities. J.A. 9; R 49:30-31.

Pautz communicated the license plate information to his dispatcher, who advised him that the vehicle was registered to Miguel Ornelas, with the additional name of Ledesma, though it was unclear whether Ledesma came before or after Ornelas. J.A. 9-10. Pautz learned from the motel clerk that Ismael Ornelas and another individua[l] had checked into Room 4 at 4:00 a.m. without reservations, and were due to leave that morning. J.A. 10.

Pautz called his partner, Donald Hurrle, to the motel. After Hurrle arrived, Pautz contacted the Milwaukee DEA office to run a Narcotics and Dangerous Drugs and Information System (NADDIS) check on Ismael Ornelas and Miguel Ledesma Ornelas. Pautz was told that

[1] The following recitation of facts is based upon those recommended findings of the magistrate judge, J.A. 9-13, 79, that were adopted by the district court, J.A. 28-29, 86, as amplified by the record of the suppression hearing. "R" followed by a volume and page citation refers to the items as numbered in the Saul Ornelas appeal record.

NADDIS had information on both names, that Miguel Ledesma Ornelas a/k/a Miguel Ledesma-Lemus, was a heroin dealer from El Centro, California, while Ismael Ornelas, Jr., of Tucson, Arizona, was a 1,000 kilogram per month cocaine dealer. J.A. 10.[2]

Pautz and Hurrle summoned Lyle Luedke, a narcotics dog handler for the Drug Enforcement Unit. Pautz departed shortly after Luedke arrived with his dog. Hurrle and Luedke took up surveillance and watched as petitioners left Room 4, loaded the trunk and entered the car. J.A. 10-11.

Hurrle and Luedke then drove their separate cars to empty spaces on either side of the Oldsmobile, got out and approached. Hurrle identified himself as a law enforcement officer and asked petitioners whether they had any illegal drugs or contraband. Petitioners responded, almost simultaneously, that they did not. Petitioners produced identifying documents. Ismael Ornelas told Luedke that they had just arrived from California. J.A. 11-12.

Petitioners consented to the officers' request to look inside the car. Saul Ornelas opened the trunk with a key and held it open while Hurrle searched the luggage and trunk area. Hurrle found nothing of interest. Meanwhile, Ismael Ornelas was "calm, but shaking." J.A. 12.

Luedke then began a search of the passenger area. He first determined that the back seat was not loose. J.A. 12. He next examined the right rear armrest area and discovered that a 6" by 10" interior panel "physically felt like it was somewhat loose." R 49:155; *see also* J.A. 12. Based upon his training and nine years' experience in narcotics enforcement (including some 2,000 car searches), together with his knowledge of the other cir-

[2] The officers did not learn until later that the individuals identified in NADDIS were not the individuals who had checked into the Suburban Motel. J.A. 10, 12.

cumstances, Luedke suspected that the loose panel had been removed and that contraband was hidden inside. J.A. 12; R 49:141, 155; R 50:226.

Luedke testified that he noticed rust in the groove of the Phillips screw used to attach a plastic vent cover located in the rear of the right door jamb adjacent to the area of the loose interior panel, which led him to believe that the vent cover had been recently removed. J.A. 12-13; R 49:155-56. Luedke removed the vent cover, exposing a 5" by 4" cavity, saw the top of a paper bag, and reached in to feel a "hard block substance," which he believed to be cocaine. R 49:156-57; *see also* J.A. 13. Unable to remove the bag through the now-open vent, Luedke felt with his hand for the back of the loose panel, which popped open toward the interior of the car. R 49:157; *see also* J.A. 13. Luedke was then able to retrieve the paper bag, which contained a block of cocaine wrapped in foil. R 49:157-58, *see also* J.A. 13. The entire encounter—from the time the officers first approached the Oldsmobile to the discovery of the cocaine—lasted between seven and ten minutes. J.A. 20; *see also* R 50:353.

Petitioners were arrested and later charged with a federal drug trafficking offense. J.A. 7, 13; R 4:1-2. A month later, a United States magistrate judge conducted a three-day hearing on their motion to suppress the fruits of the search pursuant to 28 U.S.C. § 636. J.A. 8. In his recommendations, the magistrate judge concluded that Hurrle and Luedke's initial encounter with petitioners was a lawful *Terry* stop, reasonable in length and supported by reasonable suspicion. J.A. 20-21. He also concluded that petitioners consented to a search of the car, but the consent did not extend to taking apart the interior panel. J.A. 21. Rejecting Luedke's testimony that the vent screw was rusty,[3] the magistrate judge stated that the deputies

[3] The magistrate judge examined the screw himself. *See* R 54:420-21; Government Exhibit AA.

lacked probable cause to justify the search of the cavity in which the cocaine was found. J.A. 22. Nonetheless, he recommended that the suppression motion be denied on the ground that Luedke's dog would have inevitably discovered the cocaine, citing *Nix v. Williams*, 467 U.S. 431 (1984). J.A. 22-23.

On petitioners' objections to the magistrate judge's recommendation, the district court adopted the conclusions concerning reasonable suspicion for the stop and the consent to look through the car. J.A. 28-29. It disagreed, however, with the magistrate judge's conclusion that the officers lacked probable cause to search the interior cavity for contraband, considering the totality of the circumstances, particularly the loose interior panel.[4] J.A. 31-35. The court thus denied petitioners' suppression motion without relying on the inevitable discovery ground. J.A. 30-31 & n.2, 36. Petitioners thereafter pleaded guilty, and were sentenced to substantial terms of imprisonment. J.A. 45-54.

On petitioners' appeal of the denial of their suppression motion, the Seventh Circuit applied a clear error standard of review in accordance with *United States v. Spears*, 965 F.2d 262 (7th Cir.), *cert. denied*, 506 U.S. 989 (1992). It upheld the initial stop as supported by reasonable suspicion, but ruled that it was unable to affirm the district court's probable cause holding on the record before it, because it could not tell whether the magistrate judge (who heard Luedke) had credited Luedke's testimony that the interior side panel felt loose. J.A. 65-66, 68-71. Accordingly, it remanded for a determination as to whether the panel was loose and, if so, whether the

[4] Like the magistrate judge, the district court rejected Luedke's testimony concerning the "rusty" screw, but ruled that probable cause existed prior to the "discovery" of the screw. J.A. 35 n.4.

circumstances amounted to probable cause for the search. J.A. 72-73.[5]

On remand, the district court referred the question of Luedke's loose side panel testimony to the magistrate judge. J.A. 74-75. The magistrate judge announced that he credited Luedke's testimony on the point, but recommended that the suppression motion nonetheless be granted on the ground that, even with the loose panel, the facts and circumstances did not amount to probable cause. J.A. 76-84.

The district court, exercising its obligation to make a de novo determination of the issue, *see* 28 U.S.C. § 636 (b)(1); *United States v. Raddatz*, 447 U.S. 667, 673-76 (1980), rejected the magistrate judge's recommendation. It ruled that, "weighing the evidence 'not in terms of library analysis, but as understood by those versed in the field of law enforcement,'"[6] the "confluence of facts" amounted to probable cause to search behind the loose side panel. J.A. 87.

The Seventh Circuit affirmed the denial of the suppression motion, again applying the clearly erroneous standard. J.A. 91-92.

This Court granted certiorari on the issue whether the court of appeals utilized the appropriate standard of review. J.A. 94. Because petitioners and respondent both took the position that de novo review was required, the undersigned was invited to brief and argue this case, as *amicus curiae*, in support of the court of appeals judgment.

---

[5] The Seventh Circuit discounted Luedke's testimony about the "rusty" screw, J.A. 67, and expressly rejected the inevitable discovery ground relied upon by the magistrate judge. J.A. 71-72.

[6] The internal quote is from the plurality opinion in *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

SUMMARY OF ARGUMENT

Development of the appropriate standard for appellate review of district court determinations of mixed questions of fact and law turns on an assessment of whether the trial court or the appellate court is "better positioned" to decide the particular issue. The assessment takes account of the characteristics of the question under review and the respective institutional advantages of the federal trial and appellate courts in deciding it. When a mixed question of fact and law involves application of a standard that is "non-technical" in nature to an infinite variety of fact situations—such that a decision in one case will seldom serve as a useful precedent for others—the question is appropriately committed to the district courts, subject to deferential, clearly erroneous review on appeal.

Probable cause and reasonable suspicion determinations require a "non-technical," totality of the circumstances analysis, judged from the perspective of an experienced law enforcement officer. In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court rejected the two-prong test that the Court had developed in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), for evaluating when information from an informant provided probable cause, because probable cause is a "fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," noting that "one determination will seldom be a useful 'precedent' for another." *Id.* at 232, 238 n.11.

The district courts are in the superior position to make the totality of the circumstances probable cause determination, a weighted assessment of physical and testimonial evidence under well-developed, though necessarily general, principles. The clearly erroneous standard strikes the proper balance for appellate review of probable cause and reasonable suspicion determinations, in that it assigns primary responsibility for making this non-technical deter-

mination to the district courts, while preserving the ability of the courts of appeals to correct both legal mistakes and unambiguously erroneous applications of probable cause principles.

Although the parties suggest that this Court's prior decisions have "expressly indicated" that probable cause determinations regarding warrantless searches or arrests should receive "independent review," it is not so. This Court has never directly confronted the question. In any event, "independent review" is not necessarily inconsistent with review under the clearly erroneous standard.

Adoption of the clearly erroneous standard for review of probable cause and reasonable suspicion determinations in federal criminal cases would imply no denigration of Fourth Amendment rights. The clearly erroneous standard of review would apply equally to appeals by defendants following final judgment and to pre-trial appeals by the government where a suppression motion has been granted. A decision as to the appropriate standard of appellate review is Fourth Amendment neutral.

Nor would adoption of the clearly erroneous standard on appeal undermine the preference for warrants. The clearly erroneous standard mandates deference only to decisions of the district courts as to whether there was or was not probable cause. It does not accord deference to law enforcement officers searching without a warrant. The advantages of obtaining a warrant would remain. Evidence gathered in good faith pursuant to a facially valid warrant is admissible even if a reviewing court is convinced that the magistrate's decision to issue it lacked a substantial basis. And in cases where the probable cause issue is close, doubts are resolved in favor of validating the warrant. No such advantages apply in non-warrant cases.

Were this Court to require de novo appellate review of federal district court probable cause and reasonable

suspicion determinations, two types of anomalies would arguably result. First, the Court would be requiring greater appellate scrutiny of decisions made by the district courts after full adversary hearings than is given to the seemingly less reliable decisions of magistrates who issue warrants on the basis of *ex parte* affidavits. Second, the Court would be requiring greater appellate scrutiny of federal district court probable cause and reasonable suspicion determinations than is applied in reviewing the sufficiency of the evidence to support findings of guilt in federal criminal cases. This would be an inversion of the priorities in effect established by this Court in other settings. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *Stone v. Powell*, 428 U.S. 465 (1976).

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN APPLYING THE CLEARLY ERRONEOUS STANDARD IN REVIEWING THE DISTRICT COURT'S RULINGS THAT REASONABLE SUSPICION SUPPORTED THE STOP AND PROBABLE CAUSE SUPPORTED THE AUTOMOBILE SEARCH

This case presents an important question of federal appellate criminal procedure on which the courts of appeals are divided: whether a district court's conclusions as to the existence of probable cause and reasonable suspicion are to be reviewed de novo or under the clearly erroneous standard.[7]

---

[7] *Compare, e.g., United States v. Adebayo*, 985 F.2d 1333, 1337 (7th Cir.) (clearly erroneous review), *cert. denied*, 113 S. Ct. 2947 (1993) *with United States v. Normandeau*, 800 F.2d 953, 957 n.5 (9th Cir. 1986) (de novo review). *Adebayo* relied on *United States v. Spears*, 965 F.2d 262, 269-71 (7th Cir.) (clearly erroneous review regarding existence of probable cause for a warrant), *cert. denied*, 506 U.S. 989 (1992), while *Normandeau* relied on *United States v. McConney*, 728 F.2d 1195, 1200-04 (9th Cir.) (*en banc*) (de novo review regarding existence of exigent circumstances), *cert. denied*, 469 U.S. 824 (1984). *Spears* and

A. Developing the Standard of Appellate Review

De novo review means a fresh determination of an issue that accords no weight or deference to any prior resolution of it. *See, e.g., Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 23 (1974); *United States v. First City National Bank*, 386 U.S. 361, 368 (1967); *see also Raddatz*, 447 U.S. at 690 (Stewart, J., dissenting).

By contrast, clearly erroneous review requires the appellate court "to uphold any district court determination that falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400

McConney represent the most extensive discussions of the issue by the courts of appeals.

A number of courts of appeals have taken inconsistent approaches over time. For example, while the First Circuit now reviews the conclusion as to the existence of probable cause de novo, *United States v. Zapata*, 18 F.3d 971, 975 (1st Cir. 1994), it had previously taken the contrary view, *United States v. Rodriguez-Morales*, 929 F.2d 780, 783 (1st Cir. 1991) ("[W]hether police activity is reasonable in any particular set of circumstances is almost invariably a factbound inquiry. The nisi prius court sees and hears the witnesses and will ordinarily develop a superior 'feel' for what transpired. Hence appellate oversight is correspondingly deferential; the court of appeals reviews the district court's findings of fact following a suppression hearing, including mixed fact/law findings, under the clearly erroneous test."), *cert. denied*, 502 U.S. 1030 (1993).

Similarly, the Sixth Circuit now takes the position that de novo review is required, *United States v. Padro*, 52 F.3d 120, 122 (6th Cir. 1995), whereas it had previously used the clearly erroneous standard, *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1508 (6th Cir. 1988). It has been suggested that the Sixth Circuit shifted its appellate review standard in response to a supposed "hint" in *Williams v. United States*, 500 U.S. 901 (1991), in which the Court granted certiorari, vacated and remanded the case to consider the Solicitor General's position that de novo appellate review is required. *See United States v. Sims*, 975 F.2d 1225, 1238 (6th Cir. 1992), *cert. denied sub nom. Gardner v. United States*, 507 U.S. 932 (1993); *see also United States v. Williams*, 949 F.2d 220, 221-22 (6th Cir. 1991) (on remand), *cert. denied*, 504 U.S. 958 (1992).

(1990). " 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). When the clearly erroneous standard applies, the reviewing court may not reverse the trial court "simply because it is convinced that it would have decided the case differently." *Id.*

Under neither standard does the appellate court abdicate its responsibility to conduct a thorough review of the record. Both standards require that the appellate decision rest "on the entire evidence." *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-500 (1984). The essential difference is that rulings to which the clearly erroneous standard applies are regarded as presumptively correct. *Id.*[8]

It is settled that even though no statute or rule similar to Federal Rule of Civil Procedure 52(a) so requires, a trial court's findings of fact in a criminal case (at least those unrelated to guilt) are subject to review under the clearly erroneous standard. *Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Campbell v. United States*, 373 U.S. 487, 493 (1963). But, as this Court has observed in a variety of settings, distinguishing between legal and factual issues can be quite difficult. *See, e.g., Thompson v. Keohane*, 116 S. Ct. 457, 464 (1995) ("the proper characterization of a question as one of fact or law is sometimes slippery"); *Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("the appropriate methodology for distin-

[8] For this reason, adoption of the clearly erroneous standard of review would not necessarily result in a reduction of effort by the court of appeals in every case. Adoption of the clearly erroneous standard, however, would reduce the incentive to appeal fact-driven determinations, and would logically lead to fewer appeals.

guishing questions of fact from questions of law has been, to say the least, elusive"); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (noting the "vexing nature of the distinction between questions of fact and questions of law," and adding that "[n]or do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion").

As observed in Henry M. Hart, Jr. and Albert M. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 349 (1994):

> Some critics have concluded that "law" cannot be distinguished analytically from "fact" and that at best these terms are nothing more than labels to describe a conclusion about division of function.

While the authors do not advocate abandoning the terms "fact" and "law," they argue persuasively that the decisional process is, realistically, "three-fold": (1) law declaration (*i.e.*, formulation of general propositions broad enough to cover present and future cases), (2) fact identification (*i.e.*, "what happened here") and (3) law application. *Id.* at 350-51. The inability to divide the law application function into separate "fact" and "law" categories in any easy or predictable way stems from the reality that it is an amalgamation of both.

> In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage . . . .

Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 233 n.24 (1985) (quoting J. Dick-

inson, *Administrative Justice and the Supremacy of Law in the United States* 55 (1927)) (emphasis in original).

Consistent with these observations, this Court has frankly acknowledged that

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction has at times turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

Miller v. Fenton, 474 U.S. at 114. *See also Wilton v. Seven Falls Co.*, 115 S. Ct. 2137, 2144 (1995) (holding that appellate courts must defer to district court expertise with respect to the grant or denial of declaratory relief); *Salve Regina College v. Russell*, 499 U.S. 225, 231-35 (1991) (holding that, in diversity cases, federal appellate courts must review district court rulings as to the content of state law de novo); *Pierce v. Underwood*, 487 U.S. 552, 559-61 (1988) (holding that issue whether government's position was "substantially justified" for purposes of the Equal Access to Justice Act must be reviewed under the deferential abuse of discretion standard).[9] *Cf. First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1926 (1995) ("the reviewing attitude that a court of appeals takes toward a district court should depend upon 'the respective institutional advantages of trial and appellate courts' ") (citations omitted).

---

[9] In *Cooter & Gell*, 496 U.S. at 401, the Court noted that the abuse of discretion and clearly erroneous standards, as applied to appellate review of factual determinations, are "indistinguishable." Accordingly, such decisions as *Cooter*, *Wilton* and *Pierce*, that discuss whether an appellate court should apply a deferential abuse of discretion standard of review, provide useful guidance on the question currently before the Court.

Thus, in recent years, the Court has addressed the issue of the standard of appellate review to be applied to particular mixed fact/law questions—where no statute or rule expressly governs the matter—by focusing directly on the characteristics of the question under review, the respective institutional advantages of the federal trial and appellate courts in deciding it, and, at least in some First Amendment cases, whether the "stakes are too great" to entrust the matter to the trier of fact. *See, e.g., Salve Regina College,* 499 U.S. at 231-39; *Harte-Hanks Communications v. Connaughton,* 491 U.S. 657, 686-87 (1989); *Bose Corp.,* 466 U.S. at 501 n.17; *Pullman-Standard v. Swint,* 456 U.S. 273, 287-88 (1982). The difficulty in distinguishing between legal and factual issues also arises in *habeas corpus* cases and the Court employs the same basic methodology, *see, e.g., Thompson v. Keohane; Miller v. Fenton,* though some additional and quite different considerations apply.[10]

---

[10] Federal *habeas corpus* review of state court convictions is governed by a statute, 28 U.S.C. § 2254(d), which, by virtue of its roots in *Townsend v. Sain,* 372 U.S. 293 (1963), has been construed as giving the term, "factual issue," relatively narrow scope: "basic, primary or historical facts." *See Thompson v. Keohane,* 116 S. Ct. at 464. *See also id.* at 464-65 (explaining that the term "factual issues" for *habeas* purposes includes not only "what happened" but also matters as to which the state trial court is essentially an eyewitness) (citing, *inter alia, Patton v. Yount,* 467 U.S. 1025 (1984) (juror bias), and *Maggio v. Fulford,* 462 U.S. 111 (1983) (competency to stand trial)).

The Court has repeatedly expressed confidence in state judges' ability to protect the constitutional rights of criminal defendants. *See, e.g., Miller v. Fenton,* 474 U.S. at 117. Nonetheless, in holding that certain fact-driven determinations, such as the voluntariness of confessions, are outside the scope of § 2254(d), the Court has also stressed the need for an "independent federal determination." *Id.* at 110; *see also id.* at 115. One concern that may underlie such holdings—and that reasonably supports a narrower ambit for the term "factual issue" in the *habeas* context than in federal criminal appeals—is the perceived need to insulate certain constitutional

District judges devote much of their time and energy to hearing witnesses and reviewing evidence. As a consequence, their superiority in finding facts is "unchallenged." *Salve Regina College,* 499 U.S. at 233. As the Court stated in *Anderson v. Bessemer City,* 470 U.S. at 574:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.

In recognition of the trial court's expertise as a fact finder, this Court has granted the district courts primacy in making certain fact-intensive mixed fact/law determinations, with only deferential appellate review. *See Cooter & Gell,* 496 U.S. at 402 ("[T]he district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11."). Moreover, where an arguably mixed question of law and fact involves a standard that is "non-technical" in nature and involves "application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case," the issue has been deemed particularly suitable for district court determination, and subject to clearly erroneous review on appeal. *See Commissioner v. Duberstein,* 363

---

rights from the influence of community passions on local judges (some of whom are elected). *See, e.g., Patton v. Yount,* 467 U.S. at 1052-53 (Stevens, J., dissenting). Such cases may arguably be characterized as holding that federal district courts, by reason of the independence secured by Article III, are "better positioned" than state trial courts to adjudicate the particular matter at issue. This concern for judicial independence, however, does not affect the division of authority as between federal trial and appellate judges.

U.S. 278, 289 (1960) (discussing determination whether there has been a gift for tax purposes).

Courts of appeals, by contrast, devote primary attention to legal issues, based upon review of refined briefs and collaborative discussion. *Salve Regina College*, 499 U.S. at 232. By nature, they have more time for library analysis and reflection upon matters of broad principle that govern future cases. By the same token, they are necessarily somewhat removed from the give and take of the adversary process, and may not have developed the district courts' "feel," honed by constant practice, for dividing fact from fiction. Thus, while the courts of appeals are able to correct perceived district court errors, the primary justification for the expenditure of substantial appellate judicial resources is, and should be, to develop and clarify the law. *See id.* at 233; *Cooter & Gell*, 496 U.S. at 405; *Pierce v. Underwood*, 487 U.S. at 561.

One principal focus in determining whether appellate review should be deferential or de novo has been whether the resolution of the issue in question will produce a decision of precedential significance. If so, de novo appellate review will further the mission of the courts of appeals in clarifying the law. If, on the other hand, the issue is among the "'[m]any questions that arise in litigation [that] are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization,'" *Pierce v. Underwood*, 487 U.S. at 561-62 (quoting M. Rosenberg, *Judicial Discretion of the District Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 662 (1971)), the question is more appropriately left primarily to the district courts with deferential review on appeal. *See Cooter & Gell*, 496 U.S. at 405 (noting, in reference to *Pierce*'s holding that courts of appeals should review Equal Access to Justice Act awards deferentially, that "[a]n appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish

clear guidelines for lower courts; nor will it clarify the underlying principles of law"). Put another way, de novo review of highly fact-dependent mixed fact/law determinations that are based upon a common-sense, everyday, "totality of the circumstances" analysis, "would very likely contribute only negligibly to the accuracy" of such determinations "at a huge cost in diversion of judicial resources." *Anderson v. Bessemer City*, 470 U.S. at 575.

It is respectfully submitted that, for a number of reasons, the district courts are "better positioned" than the courts of appeals to make probable cause and reasonable suspicion determinations. Further, because such rulings are so frequently tied to specific facts and circumstances, they generally lack the sort of precedential value that would justify the expenditure of appellate resources that de novo review would entail.[11]

B. Appellate Review of Probable Cause and Reasonable Suspicion Determinations

The starting point for analysis of the appropriate standard of review is an examination of the nature of probable cause and reasonable suspicion determinations. The ancient term, "probable cause," enshrined in the Fourth Amendment, refers to a quantum of proof, the point at which, considering the facts and circumstances, a particular matter is deemed sufficiently probable. To quote Chief Justice Marshall:

> [T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion.

Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813). In modern terms, probable cause is said to exist

---

[11] With respect to the expenditure of appellate resources, *see* n.8, *supra*.

at the time of arrest when "the facts and circumstances within [the law enforcement officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [individual arrested] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

Probable cause is sometimes defined in part by stating what it is not. *See Illinois v. Gates*, 462 U.S. 213, 235 (1983) (probable cause is not a "[f]inely tuned standard[] such as proof beyond a reasonable doubt or by a preponderance of the evidence"); *id.* ("While an effort to fix some general, numerically precise degree of certainty corresponding to " 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' ") (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

Probable cause never exists in a vacuum. The question is always probable cause with respect to what, such as whether there is probable cause to believe a particular individual arrested is the perpetrator of the crime, or that certain known conduct amounts to a crime, or that contraband is hidden in a particular automobile. The fact that it is applied to a myriad of situations means that developing a set of rules to cover all situations is impracticable.

It would, of course, be helpful to the district courts and law enforcement officers were this Court or the courts of appeals able to formulate a set of rules to provide specific guidance for making probable cause determinations. And, for a time, the Court attempted to do just that with respect to when information from informants, together with other facts, amounted to probable cause. But it is instructive that that effort ultimately foundered.

In the watershed case of *Illinois v. Gates*, the Court abandoned the "two-prong test" developed in *Aguilar v.*

Texas, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), together with the complex set of rules with which the test had become encrusted, in favor of a single "totality of the circumstances" approach. 462 U.S. at 228-30. In so doing, the Court underscored that the very diversity of the situations in which probable cause is applied precluded the development of a set of specific rules:

> Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a "practical, non-technical conception." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.*, at 175. Our observation in *United States* v. *Cortez*, 449 U.S. 411, 428 (1981), regarding "particularized suspicion," is also applicable to the probable-cause standard:
>
> > "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons. As we said in *Adams* v. *Williams*, 407 U.S. 143, 147 (1972): "Informants' tips, like all other clues and

> evidence coming to a policeman on the scene, may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation." *Ibid.*

Id. at 231-32.[12]

Accordingly, appellate guidance is limited to such generalizations as that the facts and circumstances are to be evaluated from the perspective of the "trained agent," *Sokolow*, 490 U.S. at 10, that law enforcement officers must be given "fair leeway" to protect the community, *Brinegar*, 338 U.S. at 176, and "[b]ecause many situations . . . are more or less ambiguous, room must be allowed for some mistakes on their part." *Id.* It is also possible to develop some broad baseline principles that can help decide future cases, such as that a totally unsubstantiated and uncorroborated anonymous tip concerning the existence of criminal activity is insufficient to establish probable cause. *See, e.g., Aguilar v. Texas*, 378 U.S. at 113-14.

For the most part, however, "[t]here are so many variables in the probable-cause equation that one determination will seldom be a useful 'precedent' for another." *Illinois v. Gates*, 462 U.S. at 238 n.11.[13] In short, most probable

[12] The "reasonable suspicion" required for an investigative stop falling short of arrest under *Terry v. Ohio*, 392 U.S. 1 (1968), follows the same "totality of the circumstances" approach as for probable cause, "the only difference being the level of suspicion that must be established." *Alabama v. White*, 496 U.S. 325, 330-31 (1990). Like probable cause, reasonable suspicion is "not readily or even usefully reduced to a neat set of rules." *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

[13] The United States suggests in a footnote that this statement in *Illinois v. Gates* was made "in passing," as if to suggest that it was a random, ill-considered dictum. Brief for the United States at 32 n.14. With all respect, the Court's statement that one probable cause determination will seldom serve as a useful precedent for another is fully consistent with, and indeed simply another means of expressing, the rationale quoted at length above at 19-20 for holding that the two-prong *Aguilar-Spinelli* test was to be discarded.

cause and reasonable suspicion determinations involve "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce v. Underwood*, 487 U.S. at 561-62. For this reason, de novo appellate review in the vast majority of cases would not further the appellate courts' primary function of clarifying and developing the law, and, it is submitted, would not contribute appreciably, if at all, to the accuracy of probable cause and reasonable suspicion determinations.

"Totality of the circumstances" determinations frequently involve a weighted assessment of physical evidence, testimony and issues of credibility. They require, for the most part, not only a scholar's analysis, but a fact-finder's "feel" for the strength of particular pieces of evidence and how the whole fits together, along with a well-developed instinct for the "mainsprings of human conduct." *Duberstein*, 363 U.S. at 289.

In this case, for example, the question whether there was probable cause to take apart the interior side panel of petitioners' car depends upon how the peculiar mix of factual variables would strike an experienced narcotics law enforcement officer. These facts include the two-door eleven-year-old General Motors car with California plates parked outside a motel in Milwaukee in December; the 4 a.m. check-in without reservations; the preliminary information from NADDIS suggesting that both the owner of the car and the individual who checked into the motel might be narcotics dealers; how petitioners reacted when stopped by the Milwaukee Deputy Sheriffs, including that they responded to a question about contraband almost simultaneously; that while one of the petitioners was holding open the trunk for one of the deputies, the other was observed to be "calm, but shaking"; and, finally, that an

officer with nine years of narcotics enforcement experience, including some 2,000 automobile searches, believed that a particular interior panel—known by him to be covering a cavity large enough to secrete a substantial quantity of drugs—felt somewhat loose to the touch.

Many facts could be added, subtracted or modified, and the evidence could be thereby strengthened or weakened, lending greater or lesser support to the conclusion that there was probable cause to take apart the interior panel. The car might have been driven to Milwaukee in the midst of a record cold snap; there might have been no information from NADDIS; the screw on the plastic vent cover might have been rusty, or missing altogether; the panel might have been said to be a "little" or "very" rather than "somewhat" loose; instead of taking apart a single interior panel that felt loose in just a few minutes as Luedke did, the deputies might have testified that all of the interior panels were loose, and spent an hour taking apart the entire car before coming upon the one cavity where drugs were hidden; or the testimony of the officers might have been inconsistent with testimony by a defendant or one another, or otherwise impeached in some degree. The variables are infinite. Attempts to draw bright lines would be futile.

It is submitted that de novo review by the court of appeals in this case could produce little of real precedential value, at least now that decades of intense Fourth Amendment litigation have settled the basic principles of probable cause determination. As the Court stated in *Illinois v. Gates*, "when we move beyond the 'bare bones' affidavits present in cases such as *Nathanson* [*v. United States*, 290 U.S. 41 (1933),] and *Aguilar*, this area simply does not lend itself to a prescribed set of rules like that which had developed from *Spinelli*." 462 U.S. at 239.

In short, probable cause and reasonable suspicion determinations require the very type of fact-intensive law application function that is the forte of the district courts, rather than the more theoretical library analysis of the courts of appeals. To be sure, district courts are capable of making mistakes, or misperceiving the content of settled principles of law. But if a district court makes a legal error, such as applying the wrong standard of analysis, the court of appeals has ample authority to reverse. And where a district court's probable cause conclusion otherwise leaves the court of appeals with the definite and firm conviction that a mistake has been made, the clearly erroneous standard is plainly adequate to correct the error. Where a general proposition capable of application in future cases can be developed, nothing about the clearly erroneous standard would prohibit its enunciation on appeal.

As this very case illustrates, it is not true that clearly erroneous review "is tantamount to no review at all." *Wilton v. Seven Falls Co.*, 115 S. Ct. at 2144 (internal quotation marks omitted). In its first decision, the Seventh Circuit carefully examined the entire record, and determined that many of the district court's conclusions were supported. It ruled, however, that the inevitable discovery ground could not be sustained, as there was no evidence as to the capabilities of the narcotics-sniffing dog. Further, it remanded on the issue whether Luedke's testimony concerning the loose interior panel should be credited, because, upon reviewing the lower court opinions, it was unclear that such a determination had been made, and it was obvious to all that Luedke's testimony about the "rusty" screw had been wrong. Following the remand, Luedke's testimony about the loose panel was credited, the district court concluded that, with that testimony, probable cause existed, and the court of appeals affirmed.

While the probable cause determination was arguably a close call, can it be said that the court of appeals was really in a better position than the district court to make

the common-sense, non-technical judgment whether, from the standpoint of an experienced law enforcement officer, the facts and circumstances suggested strongly enough that there was contraband behind the loose panel sufficient to justify taking it apart? The Seventh Circuit correctly perceived that it was not in such a position.[14]

In sum, the clearly erroneous standard strikes the proper balance for appellate review of probable cause and reasonable suspicion determinations. It leaves to the district courts primary responsibility for making common-sense, non-technical "totality of the circumstances" determinations. At the same time, it frees the courts of appeals from the burden of attempting to identify arguable errors that they are not as well positioned as the district courts to identify, while fully preserving their ability to correct legal mistakes and unambiguously erroneous applications of law to particular factual circumstances.

---

[14] It could be argued that since the district court did not actually hear any of the testimony in this case, the court of appeals was in just as good a position as the district court to make the probable cause determination. There are several answers to this. First, as the Court noted in *Bessemer*, deference to the district court's fact-finding ability is based upon its expertise in performing that function on an everyday basis, not just that it may have heard the witnesses. 470 U.S. at 574-75. Further, although the district court in this particular case opted to make its de novo determination under 28 U.S.C. § 636(b) without re-hearing the officers' testimony or calling additional witnesses, it certainly could have re-heard the testimony, viewed the car, or taken other steps if it felt the need. In other words, the district court was in the perfect position to determine whether it had what it needed in terms of evidence, or whether additional inquiry was warranted. A court of appeals' options are more limited. Finally, it would seem unduly complex to have different standards of review for cases in which the district court alone heard the suppression motion and those in which it sought the assistance of a magistrate judge under 28 U.S.C. § 636.

C. This Court's Prior Decisions

The United States suggests, without going so far as to invoke *stare decisis*,[15] that this Court has "expressly indicated" that probable cause determinations regarding warrantless searches or arrests are to be accorded "independent review." Brief for the United States at 21.[16] It is respectfully submitted, however, that nothing in the Court's prior decisions forecloses it from choosing the clearly erroneous standard of appellate review for probable cause and reasonable suspicion determinations in the federal courts, as this Court has never directly confronted the question. Where an issue has not been presented in the petition for certiorari, the Court cannot be deemed to have decided it. *See, e.g., Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976).

Moreover, while the United States relies upon language in various decisions suggesting that the Court was conducting "independent review"—a term, incidentally, that is not inconsistent with clearly erroneous review, *see* p. 11, *supra*—it fails to note that, in *United States v. Cortez*, the Court stated with apparent approval that the court of appeals "recognized that 'the ultimate question on appeal is whether the trial judge's finding that founded suspicion was present here was clearly erroneous.'" 499 U.S. at 416.

The United States relies primarily on the following language in *Ker v. California*, 374 U.S. 23, 34 (1963), quoted in *Beck v. Ohio*, 379 U.S. at 92:

---

[15] *Stare decisis* would be relatively weak in any event. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). No one acts in reliance on the standard of appellate review of suppression motion rulings in federal criminal cases.

[16] This view is echoed by petitioners and the American Civil Liberties Union (ACLU). Brief for Petitioners at 25-29; Brief Amicus Curiae of the ACLU at 8-17.

> While this court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—*i.e.*, constitutional—criteria established by this Court have been respected.

In *Ker* and *Beck*, however, the Court did not state that it was utilizing a "de novo" as opposed to a "clearly erroneous" standard of review. Rather, it simply indicated that it will search the entire record, an appellate court practice consistent with both standards. Also, the fact that the Court stated that it would do so "where *necessary* to the determination of constitutional rights" suggests that it will do so only where it has a definite and firm conviction that a mistake has been made, which again is consistent with the clearly erroneous standard of review. Finally, both *Ker* and *Beck* came to the Court on direct review of state court convictions. What may be appropriate for direct review of state court convictions does not necessarily control the Court's allocation of the decision-making function as between the district courts and courts of appeals on fact-intensive issues in federal criminal cases. This Court has no authority to make a similar allocation as between trial and appellate courts in the States' judicial systems.[17]

---

[17] The United States notes that in *Bose Corp.*, 466 U.S. at 499, the Court stated that "surely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts." Brief at 22 n.10. But this statement does not purport to address whether this Court may limit the federal courts of appeals' review of district court decisions to a narrower ambit than the Court may deem appropriate for itself on review of state-court judgments.

In any event, the *Bose Corp.* statement must be weighed against *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-13 (1986). In *Icicle*, the Court held that whether an employee falls within an exemption to the Fair Labor Standards Act is a factual question that is subject to clearly erroneous appellate review under Fed. R. Civ. P. 52(a). The court of appeals had utilized a de novo standard in reliance on *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947), in which this Court appeared, at least to the court of appeals, to have applied a de novo standard of review to a similar question under the Motor Carrier Act. This Court, however, expressly stated that *Levinson* should not be understood as bearing on the Rule 52(a) issue, inasmuch as it had come to the Court from the Supreme Court of Illinois, and

> state courts are not required to apply Rule 52(a)—a rule of *federal* procedure—to their own appellate system for reviewing factual determinations of trial courts.

475 U.S. at 712 (emphasis in original).

It would appear that the principles are not crystal clear in this area, and that it is somewhat hazardous to generalize about the appropriate procedure to be applied in federal cases on the basis of cases that come to this Court from state courts.

Potentially more problematic is *Brinegar v. United States*, a federal case in which the Court observed that there was no substantial basis for distinguishing the facts from *Carroll v. United States*, 267 U.S. 132 (1925), and stated that

> [i]n the absence of any significant difference in the facts, it cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.

338 U.S. at 171. It is respectfully submitted that this statement reflects a view that cannot be easily reconciled with *Illinois v. Gates*, which post-dates it by some thirty-four years, in which the Court observed that "there are so many variables in the probable-cause equation that one determination will seldom be a useful precedent" for another. 462 U.S. at 238 n.11. It would seem that Justice Jackson's dissenting remarks in *Brinegar*[18] are

---

[18] 338 U.S. at 184 (Jackson, J., dissenting) (emphasis in original):

more in accord with the Court's modern understanding of probable cause determinations.[19]

A second and important distinction is that in the *Carroll* case the lower court had found that the evidence showed probable cause for that search, while in this case two courts below have held that . . . there was not probable cause. If we assume the facts to be indistinguishable, this important distinction emerges from the decisions: *Carroll* held only that these facts *permitted* a District Court, if so convinced, to find probable cause from them. The Court now holds these facts *require* a finding of probable cause. This shift from a permissive to a mandatory basis is a shift of no inconsiderable significance.

[19] Other cases of this Court addressing probable cause and reasonable suspicion often involve a detailed review and analysis of the specific facts and circumstances. *See, e.g., United States v. Cortez*, 449 U.S. at 418-21; *Terry v. Ohio*, 392 U.S. 1, 27-28 (1968). But that does not mean that the Court was choosing the de novo standard of review rather than the clearly erroneous standard, inasmuch as the issue was not presented, *see* p. 25, *supra*, a number of the cases came from state courts, *see* n. 17, *supra*, and, in the cases coming from federal courts, the Court never stated it was reviewing the probable cause and reasonable suspicion determinations de novo.

In *United States v. Sokolow*, for example, the district court denied the suppression motion, but the court of appeals, exercising de novo review, reversed. This Court in turn reversed the court of appeals without comment on the standard of review. Obviously, if the court of appeals reached the wrong conclusion applying a de novo standard, *a fortiori*, its result was wrong if it should have applied the clearly erroneous standard.

Moreover, contrary to the brief of the United States, this Court did not hold that probable cause determinations in civil suits to recover damages for warrantless searches allegedly conducted without probable cause are reviewed de novo. *See* Brief for the United States at 24 n.12. The issue in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), upon which the government relies, had to do with when it is appropriate to grant summary judgment on the issue of qualified immunity in a *Bivens* action founded upon allegations of an unconstitutional search.

The notion expressed by the United States, Brief at 26, that de novo review is required so that this Court and the courts of appeals can perform the function of "expositor of the law," underestimates the extent to which that function can be performed in

D. Fourth Amendment Values

The parties suggest that the fact that probable cause and reasonable suspicion determinations are often coterminous with determinations as to whether the Constitution was violated weighs heavily toward de novo review on appeal. Brief for the United States at 29; Brief for Petitioners at 32. But this Court has never held that de novo review of "constitutional facts" is the general rule. Rather, it has affirmatively stated the opposite, that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller v. Fenton*, 474 U.S. at 113 (citing *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534 (1979) (finding of intent to discriminate subject to clearly erroneous standard of review)).

Bose Corp. and *Harte-Hanks Communications* are not to the contrary. *Bose Corp.*, in holding that de novo appellate review of actual malice determinations is required, emphasized the Court's historic role in performing a fully independent factual review in First Amendment cases in particular. 466 U.S. at 499, 503-11. *Harte-Hanks*, which re-affirmed *Bose Corp.*, specifically underscored the "unique character of the interest protected by the actual malice standard" in public official defamation cases, adding that "[t]his value must be protected with special vigilance." 491 U.S. at 686, 687.

It would be fallacious to suppose that a failure to adopt a de novo standard of appellate review of probable cause and reasonable suspicion determinations implies a denigration of Fourth Amendment rights. The clearly erroneous standard of review would apply both to district

---

the context of clearly erroneous review. If the United States is suggesting that each probable cause and reasonable suspicion determination presents the opportunity to develop the law and could serve as a useful precedent, that view would appear to fly in the face of *Illinois v. Gates*.

court decisions that there was probable cause and that there was not probable cause. The district court's decision is appealable in either case, by the defendant after judgment and by the United States immediately, pursuant to 18 U.S.C. § 3731. The decision as to the appropriate standard of federal appellate review is therefore neutral with respect to the Fourth Amendment.

It might be suggested that to adopt the clearly erroneous standard for appellate review of probable cause decisions in cases not involving warrants would denigrate the warrant requirement. But adoption of the clearly erroneous standard implies no more than that the courts of appeals should give deference to probable cause decisions of district courts. There is no suggestion that any court would be deferring to a police officer's decision to search or arrest without a warrant.

Nor would adoption of the clearly erroneous standard of review remove law enforcement officers' incentives to obtain a warrant. Ample advantages would remain. Evidence gathered pursuant to a facially valid warrant is admissible even if a reviewing court is convinced that the magistrate's decision to issue it lacked a substantial basis. *See United States v. Leon*, 468 U.S. 897 (1984). And unlike in non-warrant search cases, where the probable cause decision is close, doubts are resolved in favor of validating a warrant. *See Illinois v. Gates*, 462 U.S. at 237 n.10; *United States v. Ventresca*, 380 U.S. 102, 109 (1965). In sum, a law enforcement officer who obtains a warrant before searching will justifiably have great comfort in the admissibility of any evidence gathered. To search without a warrant entails greater risk.

E. Anomalies That Would Result From De Novo Review

If the Court were to require de novo review of probable cause and reasonable suspicion determinations in cases where there was no warrant, two types of anomalies would arguably result.

First, this Court would be requiring the courts of appeals to apply greater scrutiny to probable cause determinations made in non-warrant cases after a full adversary hearing in the district court than to seemingly less reliable determinations made on the basis of *ex parte* affidavit presentations in warrant cases. *See Massachusetts v. Upton*, 466 U.S. 727, 733 (1984); *Illinois v. Gates*, 462 U.S. at 238-39. While the Court might well regard such a result to be the unavoidable byproduct of a desire to encourage warrants, it would nonetheless appear to be a less than balanced allocation of appellate judicial resources. *See Spears*, 965 F.2d at 270 (discussing Judge Posner's concurrence in *United States v. McKinney*, 919 F.2d 405, 422 (7th Cir. 1990)).

A second type of anomaly that would emerge from requiring de novo review of probable cause and reasonable suspicion determinations in federal cases is that greater appellate scrutiny would then be given to such determinations than to findings of guilt following a bench trial. It has long been the rule in the federal courts that, in reviewing the sufficiency of the evidence to support a conviction, the court of appeals must affirm so long as the evidence, viewed in the light most favorable to the prosecution, could lead a rational trier of fact to find guilt beyond a reasonable doubt. *See, e.g., Glasser v. United States*, 315 U.S. 60, 80 (1942); *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied sub nom. Smith v. United States*, 331 U.S. 837 (1947). *Jackson v. Virgina*, 443 U.S. 307, 318-19 (1978), effectively raised the *Glasser/Curley* standard to constitutional status, in ruling that *In re Winship*, 397 U.S. 358 (1970), required federal courts to review state-court convictions for sufficiency of the evidence on *habeas corpus*. Unlike de novo appellate review, which requires that the court weigh the evidence for itself, however, "this [*Jackson v. Virginia* sufficiency of the evidence] inquiry does not require a court to 'ask itself whether *it* believes that the evidence

at the trial established guilt beyond a reasonable doubt.' " 443 U.S. at 318-19 (emphasis in original).

It is respectfully submitted that the evidence review mandated by *Jackson v. Virginia,* and that is applied on apellate review of federal criminal convictions, is virtually indistinguishable from the clearly erroneous standard of appellate review. To require greater appellate review of Fourth Amendment determinations under the de novo standard, while reviewing findings of guilt under the *Jackson v. Virginia* standard, would seem to be both illogical and an inversion of this Court's established priorities.[20]

---

[20] In *Stone v. Powell,* 428 U.S. 465, 495 n.37 (1976), the Court held that where there has been a full and fair opportunity to litigate a motion to suppress in the state courts, the issue would not be cognizable at all on federal *habeas corpus. Jackson v. Virginia,* in holding that sufficiency of the evidence due process challenges would henceforth be cognizable on *habeas,* expressly distinguished *Stone v. Powell,* stating that "[t]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." 443 U.S. at 323.

Although *Stone v. Powell* was decided on the basis that to hear Fourth Amendment claims on *habeas* would not further the deterrence purpose behind the exclusionary rule, it would be anomalous to require greater appellate review of Fourth Amendment determinations than findings of guilt in federal criminal cases, on one hand, while on the other requiring federal courts on *habeas* to review state court convictions for sufficiency of the evidence, but not to review Fourth Amendment determinations at all.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PETER D. ISAKOFF *
(Amicus Curiae, invited by
Court, per Order of
December 4, 1995)
DAVID A. HICKERSON
WEIL, GOTSHAL & MANGES LLP
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 682-7000
* Counsel of Record

February 15, 1996